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Supreme Court, U.S.
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No. 92-___

In The

# Supreme Court of the United States

October Term, 1992

JESSE CAMPOS, *ET AL.*,

*Petitioners,*

v.

THE CITY OF HOUSTON, *ET AL.*,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the courts below err in allowing the city to sue its own minority citizens in a local district court, thereby circumventing the preclearance process of section 5 of the Voting Rights Act of 1965, as amended, and the case or controversy requirement of the Constitution?

2. Did the courts below err in not holding as a matter of law that it is inconsistent with section 5 of the Voting Rights Act of 1965, as amended, for an election to be held under an interim plan to which the Attorney General has objected when a precleared plan is available?

## PARTIES

The following were parties in the courts below:

Jesse Campos;
W. R. (Resendes) Morris; and
The Mexican American Bar Association
of the City of Houston,

*Plaintiffs-Appellants*;

The City of Houston, Texas;
Kathryn Whitmire, Mayor;
City Council Members:
Jim Greenwood;
Eleanor Tinsley;
Sheila Jackson Lee;
Beverly Clark;
Margarette Robinson;
Larry McKaskle;
Ernest McGowen, Sr.;
Vince Ryan;
Ben T. Reyes;
Dale M. Gorczynski;
Al Calloway;
Christin Hartung;
John Goodner; and
Frank O. Mancuso,

*Defendants-Appellees.*

# TABLE OF CONTENTS

Questions Presented . . . . . i

Parties in the Courts Below . . . . . ii

Table of Contents . . . . . iii

Table of Authorities . . . . . iv

Opinions Below . . . . . 1

Jurisdiction . . . . . 2

Statutory Provision . . . . . 2

Statement of the Case . . . . . 2

Reasons for Granting the Petition . . . . . 6

I. The Courts Below Misinterpreted the Scope of the Coverage of Section 5 . . . . . 7

II. The Courts Below Lacked Jurisdiction to Consider the City's Counterclaim . . . . 12

III. The Courts Below Lacked Authority to Implement a Plan to Which the Attorney General Objected . . . . . 17

Conclusion . . . . . 22

# TABLE OF AUTHORITIES


| *Cases* | *Pages* |
|---|---|
| Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) | 15 |
| Allen v. State Board of Elections, 393 U.S. 544 (1969) | 5, 8, 9 |
| Burton v. Hobbie, 543 F. Supp. 235 (M.D. Ala.) (three-judge court), *aff'd*, 459 U.S. 961 (1982) | 20 |
| City of Rome v. United States, 446 U.S. 156 (1980) | 4 |
| Clark v. Roemer, 111 S. Ct. 2096 (1991) | 9, 18 |
| Ely v. Klahr, 403 U.S. 108 (1971) | 20 |
| Georgia v. United States, 411 U.S. 526 (1973) | 7 |
| Hathorn v. Lovorn, 457 U.S. 255 (1982) | 9 |
| Heggins v. City of Dallas, 469 F. Supp. 739 (N.D. Tex. 1979) (three-judge court) | 20 |

Herron v. Koch, 523 F. Supp. 167 (E.D.N.Y. 1981) (three-judge court) (per curiam) . . . . . 20

Illinois Legislative Redistricting Comm. v. LaPaille, 786 F. Supp. 704 (N.D. Ill. 1992) (three-judge court), *petition for cert. filed*, 61 U.S.L.W. ____ (U.S. Sep. 8, 1992) (No. 92-522) . . . . . 16

Jordan v. Winter, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court) (per curiam), *vacated and remanded on other grounds*, 461 U.S. 921 (1983) . . . . . 19

Kilgarlin v. Hill, 386 U.S. 120 (1967) (per curiam) . . . . . 20

Lopez v. Hale County, 1992 U.S. Dist. Lexis 13217 (N.D. Tex. Sep. 1, 1992) (three-judge panel), *stay denied*, 61 U.S.L.W. 3253 (U.S. Sep. 30 1992) . . . . . 21

McCain v. Lybrand, 465 U.S. 236 (1984) . . . . 10

McDaniel v. Sanchez, 452 U.S. 130 (1981) . . 10, 18

Muskrat v. United States, 219 U.S. 346 (1911) . . . . . 13

NAACP v. Button, 371 U.S. 415 (1963) . . . . 16

Scottsboro v. Battles, No. 88-5318 (N.D. Ala. Sep. 8, 1988) . . . . . 15, 16

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) . . . . . 13

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950) . . . . . 15

South Carolina v. Katzenbach, 383 U.S. 301 (1966) . . . . . 10, 11, 14, 17

South Carolina v. United States, 589 F. Supp. 757 (D.D.C. 1984) (three-judge court) (per curiam) . . . . . 19

Terrazas v. Clements, 537 F. Supp. 514 (N.D. Tex.) (three-judge court) (per curiam), *stay denied*, 456 U.S. 902 (1982) . . 19, 20

Thornburg v. Gingles, 478 U.S. 30 (1986) . . . . . 8

United Jewish Organizations v. Carey, 430 U.S. 144 (1977) . . . . . 7

United States v. Board of Supervisors of Warren County, 429 U.S. 642 (1977) (per curiam) . . . . . 8, 9, 12

United States v. City of Houston, No. 91-3076 (S.D. Tex. filed Oct. 17, 1991) (three-judge court) . . . . . 5, 11

United States v. City of Houston, Nos. 91-3076, 91-3117, 1992 WL 232359 (S.D. Tex. August 21, 1992) (three-judge court) . . . . . 21

Watkins v. Mabus, 771 F. Supp. 789 (S.D. Miss.) (three-judge court) (per curiam), *aff'd in part and vacated in part*, 112 S.Ct. 412 (1991) . . . . . 21

*Statutory and Constitutional Provisions*

U.S. Const. amend. XIV . . . . . 3

U.S. Const. art. III . . . . . 12, 13, 16

Declaratory Judgment Act, 28 U.S.C. § 2201(a) (1988) . . . . . 14

Voting Rights Act of 1965, § 2, 42 U.S.C. § 1973 (1988) . . . . . 3, 8, 14, 15

Voting Rights Act of 1965, § 5, 42 U.S.C. § 1973c (1988) . . . . . *passim*

42 U.S.C. § 1973l(b) (1988) . . . . . 8

*Other Materials*

Voting Rights: Hearings Before Senate Judiciary Comm., 89th Cong., 1st Sess., part 1 (1965) . . . . . 17

Voting Rights: Hearings Before Subcommittee No. 5 of the House Judiciary Comm., 89th Cong., 1st Sess. (1965) . . . . . 7, 11

S. Rep. No. 417, 97th Cong., 2d Sess. (1982) . . . . . 8, 18

S. Rep. No. 295, 94th Cong., 1st Sess. (1975) . . . . . 8, 10

H. Rep. No. 196, 94th Cong., 1st Sess. (1975) . . . . . 10

H. Rep. No. 397, 91st Cong., 1st Sess. (1969) . . . . . 10

H. Rep. No. 439, 89th Cong., 1st Sess. (1965) . . . . . 17

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**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 968 F.2d 446 and reprinted in the Appendix at pages A-1 to A-15. The order of the Fifth Circuit denying rehearing en banc is reported at 966 F.2d 674. The order of the United States District Court for the Southern District of Texas is reported at 776 F. Supp. 304 and reprinted in the Appendix at pages A-16 to A-27.

## JURISDICTION

The decision for which review is sought was entered by the appeals court on July 31, 1991.[1] App. at A-1. Rehearing en banc had already been denied on June 1, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

This case involves section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, which is reprinted in the Appendix, at pages A-28 to A-29.

## STATEMENT OF THE CASE

At stake in this case is whether the Voting Rights Act should be preserved in the manner Congress intended or be undermined by political machinations. Specifically, the issue is whether the City of Houston's suit against its Hispanic citizens to implement a redistricting plan objected to by the Attorney General violates the Voting Rights Act.

In 1979, the City of Houston adopted a city council system consisting of fifteen members, including the mayor. All fifteen members serve concurrent two-year terms and

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[1] This opinion substituted for a previous opinion issued on May 1, 1992, and reported at 960 F.2d 26.

are elected in November of odd years. Nine of these councilmembers are elected from single-member districts; five members are elected at-large; the mayor is also elected at-large. App. at A-2.

In April 1991, the petitioners, Hispanic registered voters in the city and the Houston Mexican American Bar Association, brought a suit [hereinafter the *Campos* litigation] against the City of Houston in the United States District Court for the Southern District of Texas seeking a permanent injunction prohibiting city council elections on the grounds that the council's at-large seats diluted Hispanic voting strength in violation of section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and the Fourteenth Amendment to the United States Constitution. App. at A-3. At the time there was only one Hispanic councilmember in Houston even though Hispanics comprised 27.6 percent of the city's population.

The petitioners' suit contained neither a claim under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, nor a claim that the single-member seats violated the Constitution's one-person, one-vote requirement.

On June 5, 1991, the city passed a redistricting plan for the nine single-member seats based on 1990 census data to correct for population changes in the old single-member districts. The at-large seats remained unchanged. On July 9, the city submitted this new plan to the United States Attorney General for preclearance pursuant to section 5 of the Voting Rights Act. After several responses to the Attorney General's request for more information, the city finally completed its submission on September 27. App. at A-3 to A-4.

On October 4, 1991, the Attorney General interposed a timely objection to the city's redistricting plan under section 5 of the Voting Rights Act. App. at A-4.

If the city wanted to pursue its plan, it should have brought a declaratory judgment action in the United States District Court for the District of Columbia pursuant to section 5. Instead, on October 7, the city filed a motion for leave to file a supplemental counterclaim against its own Hispanic citizens in the section 2 *Campos* litigation in the local district court. This counterclaim requested that the court order the city to use the plan to which the Attorney General objected on an interim basis for the 1991 election.[2] In order to accomplish this goal, the city also requested that the court issue a declaratory judgment regarding the constitutionality of the old plan.[3] App. at A-4.

On October 11, in another attempt to implement a redistricting scheme, the city submitted a different apportionment plan for the nine single-member districts to the Attorney General for preclearance. The following day, the Attorney General precleared the city's reworked plan.

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[2] On October 10, the city amended its counterclaim to request only the use of "an interim plan" rather than specifying the plan objected to by the Attorney General. (City of Houston's First Amended Supplemental Counterclaim at 6.)

[3] Because of the Attorney General's objection to the city's redistricting plan, the old 1979 plan remained in place. *See City of Rome v. United States*, 446 U.S. 156, 182-83 (1980). In order to implement on an interim basis the plan to which the Attorney General objected, the city first needed to have the old plan declared unconstitutional. Such a declaration would leave the city with no plan at all and empower the court to implement an interim plan.

App. at A-5. Thus, three possible plans were before the district court: (1) the plan passed in 1979; (2) the plan to which the Attorney General objected; and (3) the plan that the Attorney General precleared.

After receiving notification of the Attorney General's preclearance action, the district court enjoined the city from using the 1979 plan. Rather than implementing the newly precleared plan #3, however, the court ordered that the city use plan #2 as an interim plan for the 1991 election, even though the Attorney General had objected to the plan. App. at A-27.

On October 16, the petitioners sought a stay, which the district court denied the following day. On October 24, the Fifth Circuit Court of Appeals also denied the stay. Finally, on October 29, Justice Scalia, acting as the Circuit Justice for the Fifth Circuit, denied the stay. App. at A-6.

Meanwhile, on October 17, the United States, which participated in this litigation as an *amicus* on the side of the petitioners but was never a party in the *Campos* litigation and thus not bound by the decision, filed an enforcement action under section 5 of the Voting Rights Act seeking to enjoin the election. *United States v. City of Houston*, No. 91-3076 (S.D. Tex. filed Oct. 17, 1991) (three-judge court). A three-judge panel refused to grant the injunction on October 29.[4] App. at A-6. The election was held on November 5, 1991.

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[4] Since the Justice Department's suit was filed under section 5, a three-judge panel was required. *E.g., Allen v. State Board of Elections*, 393 U.S. 544, 560-63 (1969).

The petitioners appealed the district court's order in the *Campos* litigation to the Court of Appeals for the Fifth Circuit, the primary argument being that the district court lacked jurisdiction to hear the city's counterclaim. On July 31, 1992, the appeals court ruled that the district court had jurisdiction to approve an interim plan, but had abused its discretion in this situation by not choosing the precleared plan. App. at A-13.[5]

## REASONS FOR GRANTING THE PETITION

Section 5 of the Voting Rights Act of 1965, as amended, states that no covered jurisdiction, such as Houston, "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without receiving approval of the change through a declaratory judgment action in the District Court for the District of Columbia or

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[5] This opinion substituted for an opinion the Fifth Circuit originally issued on May 1, 1992. In its earlier opinion, the appeals court stated: "Because the remedy sought by the City and implemented by the district court effectively circumvented the requirements of Section 5, we hold that the district court exceeded its authority.... [W]hen the Attorney General has interposed a timely objection under Section 5, only a court with jurisdiction to resolve actions under Section 5 has the power to order that elections be conducted under that plan." 960 F.2d 26, 30-31 (5th Cir. 1992) (withdrawn). Why the appeals court, on its own motion, withdrew the May 1 opinion and substituted the July 31 opinion that reaches a contrary conclusion is a mystery.

preclearance from the Attorney General.[6] 42 U.S.C. § 1973c (emphasis added).

In keeping with congressional intent, this Court has repeatedly held that reapportionment plans of covered jurisdictions must be approved by the Attorney General or by the District of Columbia District Court. *E.g., United Jewish Organizations v. Carey*, 430 U.S. 144, 157 (1977); *Georgia v. United States*, 411 U.S. 526 (1973).

The Fifth Circuit's decision, however, gives local district courts authority to implement voting plans through a claim by a covered jurisdiction against its minority citizens. Because this tack is contrary to the purpose of the Voting Rights Act and established precedent, the petition for a writ of certiorari should be granted.

## I. THE COURTS BELOW MISINTERPRETED THE SCOPE OF THE COVERAGE OF SECTION 5

In allowing the City of Houston to ignore established preclearance procedures under section 5 of the Voting Rights Act, the courts below eviscerated the protections the Act affords citizens in covered jurisdictions. When Congress passed the Voting Rights Act it meant to preclude evasions such as those used by the city to implement its chosen plan.

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[6] The broad scope of section 5 was apparent at the time of passage of the Voting Rights Act. *See Voting Rights: Hearings Before Subcommittee No. 5 of the House Judiciary Comm.*, 89th Cong., 1st Sess. 60-62 (1965) (testimony of Attorney General Katzenbach).

Congress has declared its "objective to utilize a form of primary jurisdiction for Section 5 review under which courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or to the District of Columbia District Court." S. Rep. No. 295, 94th Cong., 1st Sess. 18 (1975). In fact, Congress specifically denied local district courts jurisdiction over declaratory judgment claims brought by covered jurisdictions pursuant to section 5. 42 U.S.C. § 1973l(b) (1988). Congress was concerned that local district courts would look more favorably on governmental entities than on minority citizens. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 58-59 (1982).[7] Moreover, this preclearance system allows the District of Columbia District Court to develop expertise in its section 5 determinations and encourages consistent decisions across disparate regions. Thus, while local district courts have jurisdiction over section 2 suits, for example, only the District of Columbia District Court can decide whether or not a plan can be implemented under section 5.

To be sure, local district courts do have jurisdiction over some section 5 cases. In this regard, this Court has drawn a clarifying distinction between "coverage" and "substantive" questions. *Allen v. State Board of Elections*, 393 U.S. 544, 559 (1969); *see also United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977) (per curiam). Private plaintiffs can bring declaratory judgment actions concerning whether a new procedure is subject to section 5 -- a coverage question -- in a district court. *Allen*, 393 U.S. at 560.

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[7] The Senate Report is an "authoritative source" in ascertaining legislative purpose. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986).

In substantive cases involving whether a voting provision is discriminatory under section 5, however, only the District of Columbia District Court can hear a covered jurisdiction's declaratory judgment action. *Id.* at 558-59. In *Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982), this Court reversed the Mississippi Supreme Court's decision to allow an election to be held under a plan to which the Attorney General objected, holding that when an election change is covered by section 5, "courts may not further implement that change until the parties comply with § 5." Yet this is exactly what the district court did in *Campos*.

Rather than comply with section 5, the city created its own emergency in order to implement an interim plan. As long as plan #1 was in effect, the city could only implement a precleared plan. Any voter could have brought suit to enjoin the city from using an unprecleared plan. *Clark v. Roemer*, 111 S.Ct. 2096, 2101 (1991); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645 (1977) (per curiam); *Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969).

By asking for and receiving a declaratory judgment that plan #1 was unconstitutional, the city created a situation in which some plan needed to be implemented. Rather than the usual situation where voters challenge a plan's legality, the city itself did so. If it had not, the city could have used plan #1 in the 1991 elections. By deciding not to use the old plan, the city itself created the opening for an interim plan to be ordered by the district court. The city blatantly ignored the Voting Rights Act's mandate that covered jurisdictions bring declaratory judgment actions for approval of voting plans in the District Court for the District of Columbia.

The city's circumventive action violates the Voting Rights Act. As this Court has recognized, Congress was aware that covered jurisdictions had used "the extraordinary strategem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination" and "might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966); *see also* H. Rep. No. 196, 94th Cong., 1st Sess. 8 (1975); S. Rep. No. 295, 94th Cong., 1st Sess. 15 (1975).

When Congress extended the Voting Rights Act for the first time, it specifically recognized the importance of section 5 in preventing "new subterfuges." H. Rep. No. 397, 91st Cong., 1st Sess. 8 (1969).

Congress further expressed its confidence in the preclearance procedures when the Voting Rights Act was amended in 1975. The Senate Report states that section 5 ensures that "progress shall not be destroyed through new procedures and techniques." S. Rep. No. 295, 94th Cong., 1st Sess. 19 (1975); *see also* H. Rep. No. 196, 94th Cong., 1st Sess. 11 (1975).

In accordance with such explicit congressional intent, this Court has interpreted the preclearance provisions as having a "prophylactic purpose." *McCain v. Lybrand*, 465 U.S. 236, 246 (1984). This Court has also declared that it is a "well-settled rule that § 5 is to be given a broad construction." *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981). Congress itself has endorsed this Court's "broad interpretations" of section 5. H. Rep. No. 196, 94th Cong., 1st Sess. 9 (1975); S. Rep. No. 295, 94th Cong., 1st Sess.

16 (1975).

In addition to avoiding the District of Columbia District Court, the city also evaded the mandate of the Voting Rights Act that all declaratory judgments by covered jurisdictions be brought against the United States. The correct defendant in voting rights cases is the United States, not individual voters. *See, e.g., Voting Rights: Hearings Before Subcommittee No. 5 of the House Judiciary Comm.*, 89th Cong., 1st Sess. 90-91 (1965) (testimony of Attorney General Katzenbach). In *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966), this Court made no mention of individual defendants in voting rights cases, concluding that a covered jurisdiction "wishing to make use of a recent amendment to its voting laws ... has a concrete and immediate 'controversy' with the Federal Government." The broad scope of section 5 prohibits the city from choosing to sue its minority citizens rather than the United States.

By avoiding bringing its suit in the District of Columbia District Court against the federal government, the city subverted the purpose of the Voting Rights Act because the counterclaim did not bind all interested parties. Under this analysis, the counterclaim was improper because the only people it bound were those Hispanic citizens before the court. Thus, the Attorney General's office brought its own section 5 enforcement suit against the city.[8] *United States v. City of Houston*, No. 91-3076 (S.D. Tex. filed Oct. 17, 1991) (three-judge court). The city's evasion of section 5 preclearance standards defeated

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[8] Theoretically, any Houston voter could have brought a similar lawsuit since only the Hispanic parties before the court were bound.

the structuring purpose of the Voting Rights Act by creating more litigation. The Act was meant to avoid such multiple lawsuits by limiting preclearance cases to the District of Columbia District Court with the United States as the defendant.

Through designating appropriate courts, parties, and procedures, the preclearance system harmonizes what would otherwise be disparate responses to the demands of the Voting Rights Act; it brings order to the process. Any covered jurisdiction interested in circumventing preclearance requirements can now use the *Campos* litigation as a blueprint. This Court must foreclose the use of the City of Houston's techniques as violative of the Voting Rights Act.

## II. THE COURTS BELOW LACKED JURISDICTION TO CONSIDER THE CITY'S COUNTERCLAIM

Not only did the City of Houston circumvent the Voting Rights Act through its counterclaim, but its suit lacked the essential elements needed to meet the case or controversy requirement of Article III of the Constitution.[9]

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[9] It should also be noted that the city used the counterclaim to avoid the Voting Rights Act's mandate that section 5 issues be considered by a three-judge court. Section 5 states: "Any action under this section shall be heard and determined by a court of three judges...." 42 U.S.C. § 1973c. If the appellants or the Attorney General had brought suit against the city for attempting to implement a redistricting plan in violation of section 5, a three-judge panel would have been required. *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645 (1977) (per curiam). Similarly, had the city brought a declaratory judgment action

The petitioners did not implement plan #1, which the city sought to be declared unconstitutional. It was the city itself that had control over the old plan. Nor did the petitioners have any power over which redistricting plan should be used. The city first enacted the possibly malapportioned plan, and the city then attempted to implement an objected-to redistricting plan. No actual controversy between adverse parties existed since the only actor was the city. Therefore, the district court lacked jurisdiction. *See, e.g., Muskrat v. United States*, 219 U.S. 346, 361 (1911).

In declining to stay the district court's order based on the potential injury at stake, Justice Scalia nonetheless declared that he was "doubtful of the district court's authority to issue the present order." *Campos v. City of Houston*, 112 S.Ct. 354 (1991) (Scalia, J., in chambers). Because the city must not be allowed to skirt a constitutional requirement, this Court must make clear the district court's authority.

Since the petitioners had no power over redistricting, and since the city's counterclaim was not in response to the petitioners' original suit, the city lacked standing. In *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976), this Court held that Article III "requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant...." The only party meeting that description in *Campos* is the city

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against the United States, under section 5, a three-judge District of Columbia panel would have heard the case. 42 U.S.C. § 1973c. Here, however, the city used an already pending suit to circumvent the three-judge requirement.

itself. Therefore, in *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966), this Court describes a covered jurisdiction's "controversy" with the United States not with minority citizens.

Further, the city had no reason to believe it was preempting litigation. The petitioners never threatened to bring a one-person, one-vote claim to halt the election, which would have opened the way for a declaratory judgment. The petitioners expressed no interest in the malapportioned single-member council seats. In fact, the section 2 suit concerned only the at-large seats and their dilution of Hispanic voting strength. The petitioners had no desire to enjoin only the single-member seats under a one-person, one-vote challenge that would leave the at-large seats intact.

If the petitioners had not brought their section 2 claim, they could not have been sued. The city would have had no plausible reason to sue its Hispanic community for a one-person, one-vote declaratory judgment and the installation of an interim plan. The petitioners had no power over the redistricting process. That the petitioners were already in court on an unrelated matter should not serve as reason to allow otherwise untenable claims.

The use of the Declaratory Judgment Act in no way reduces the application of the case or controversy requirement.[10] This Court has made clear that "the

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[10] The Declaratory Judgment Act provides that if there exists "a case of actual controversy within its jurisdiction, ... any court of the United States ... may declare the rights and other legal relations of any interested party...." 28 U.S.C. § 2201(a) (1988).

operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937); *see also Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). To meet the Article III requirement, a substantive controversy must still exist that is "definite and concrete, touching the legal relations of parties having adverse legal interests." *Haworth* at 240-41.

Allowing covered jurisdictions to bring suits that do not meet the case or controversy requirement has negative policy ramifications. The city's counterclaim against the Hispanic citizens served only as retaliation for bringing the section 2 claim in the first place. This Court should not tolerate such a punitive response.

The petitioners did not even file a section 5 or a one-person, one-vote claim. Thus, the city was not answering the petitioners' allegations, but in effect sued itself and all of its citizens by bringing an unrelated counterclaim against some of its citizens -- citizens who were not responsible for any of the plans in question. If covered jurisdictions are allowed to bring such suits, a chilling effect will result. The resources of minority groups will be drained defending section 5 actions, leaving such advocacy groups in a poor position to perform their primary purpose of protecting minority rights. The appeals court's reasoning would even allow covered jurisdictions to bring suits against minority groups that are not litigating, but are simply protesting against an apportionment plan.[11]

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[11] This is precisely what happened in *Scottsboro v. Battles*, No. 88-5318 (N.D. Ala. Sep. 8, 1988) (settled after appeal filed). After complaints by two African-American organizations about the legality of

Furthermore, if the city can essentially sue itself for a declaratory judgment and injunctive relief in this situation, the limits on creative pleading are virtually boundless.[12] Covered jurisdictions will always prefer to sue parties like the petitioners rather than face the Attorney General's resources and prestige. Replacing the congressionally chosen defendant of the federal government with a private defendant violates the case or controversy requirement of Article III, twists the Voting Rights Act beyond recognition, and potentially threatens the right to vote.

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the Scottsboro City Council election system, the city sued the minority groups seeking a declaratory judgment that the election system was valid under section 2 of the Voting Rights Act. In addition to questions like those raised in *Campos* regarding whether this was an appropriate use of the Declaratory Judgment Act and whether a case or controversy was present, the *Battles* case raises troubling free speech issues. Even if a line theoretically can be drawn that only allows reverse declaratory judgment suits when minority groups are already involved in litigation, this Court has held that litigation is protected activity under the First Amendment. *NAACP v. Button*, 371 U.S. 415, 428-30 (1963). The potential for retaliation through bringing a lawsuit against minority groups can only have a chilling effect on protected activity. Further, allowing covered jurisdictions to bring preemptive suits will complicate an already difficult process and multiply the amount of voting rights litigation.

[12] The most recent round of redistricting for the Illinois legislature was decided when one faction of the Illinois Legislative Redistricting Commission brought a declaratory judgment action against the rest of the Commission's members. *Illinois Legislative Redistricting Comm. v. LaPaille*, 786 F. Supp. 704 (N.D. Ill. 1992) (three-judge court), *petition for cert. filed*, 61 U.S.L.W. ____ (U.S. Sep. 8, 1992) (No. 92-522).

## III. The Courts Below Lacked Authority to Implement a Plan to Which the Attorney General Objected

Even if the city complied with both section 5 and jurisdictional requirements in suing its own minority citizens, an interim plan cannot be used to circumvent the preclearance requirements of the Voting Rights Act. If Houston were allowed to implement a plan to which the Attorney General objected simply by labeling it an "interim" plan, section 5 would be eviscerated. Covered jurisdictions would have every incentive to wait until just before an election in order to put into place a redistricting plan. As this Court has recognized, however, Congress made a purposeful decision "to shift the advantage of time and inertia from the perpetrators of the evil [voting discrimination] to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). The Voting Rights Act was meant to put an end to the advantages of delay and to the types of tactics used by the city. Although the appeals court ruled that the district court abused its discretion in implementing the objected-to plan, this Court should make clear that the decision was error as a matter of law.

One of the main purposes of the Voting Rights Act was to set up a system that would avoid the problems of litigation where jurisdictions use "new discriminatory techniques not covered by the letter of the judgment." *Voting Rights: Hearings Before Senate Judiciary Comm.*, 89th Cong., 1st Sess., part 1 at 14 (1965) (testimony of Attorney General Katzenbach); *see also* H. Rep. No. 439, 89th Cong., 1st Sess. 11 (1965) (need for "more effective

measures"). In extending the Voting Rights Act in 1982, Congress declared that "[w]ithout the preclearance of new laws, many of the advances of the past decade could be wiped out overnight with new schemes and devices." S. Rep. No. 417, 97th Cong., 2d Sess. 10 (1982). The Voting Rights Act was meant to erect an airtight preclearance requirement.

This is not the first time that this Court has been called upon to stop lower courts from circumventing preclearance requirements. *McDaniel v. Sanchez*, 452 U.S. 130 (1981), for example, held that a district court ruled incorrectly in not requiring a reapportionment plan fashioned by a covered jurisdiction in compliance with a court order to be precleared under section 5. This Court declared that "if covered jurisdictions could avoid the normal preclearance procedure by awaiting litigation challenging a refusal to redistrict after a census is completed, the statute might have the unintended effect of actually encouraging delay in making obviously needed changes in district boundaries." *Id.* at 151. Houston simply found another way to make delay work in its favor.

It is uncontested that given an emergency, a court-ordered plan is appropriate. Unlike the district court, however, courts in the past have followed a more logical line of reasoning in evaluating redistricting plans to which the Attorney General has objected. In *Clark v. Roemer*, 111 S.Ct. 2096 (1991), this Court held that the district court erred in not enjoining judicial elections to which the Attorney General objected. Several cases demonstrate that the prevailing judicial opinion would not sanction the district court's embrace of an objected-to plan when a precleared plan was available.

In an injunction action to prevent South Carolina from avoiding preclearance procedures by adopting an interim plan through litigation, a three-judge District of Columbia panel reasoned that when courts are asked to develop interim plans "the 'interim' plans they adopt should not put into effect the very plans being substituted which have failed of preclearance by the Attorney General or are awaiting a preclearance decision by this Court." *South Carolina v. United States*, 589 F. Supp. 757, 759 (D.D.C. 1984) (three-judge court) (per curiam). The court was wary of collusive litigation resulting in circumvention of section 5 through the vehicle of an interim plan. *Id.* Although the *Campos* litigation was not collusive, it had the same circumventive effect.

In *Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court) (per curiam), *vacated and remanded on other grounds*, 461 U.S. 921 (1983). the district court noted that "it would be a rare case in which a federal court, compelled to devise an interim redistricting plan, would have opportunity to place into effect a plan that had been precleared under § 5." *Id.* at 1141. The implication is that if a precleared plan does exist, it should be used as the interim plan. The court's reasoning further supports this implication. "Insofar as this court's interim plan-making task is controlled by the Voting Rights Act, we may not substitute our judgment for that of the Attorney General." *Id.* at 1142.

Similarly, in *Terrazas v. Clements*, 537 F. Supp. 514, 540 (N.D. Tex.) (three-judge court) (per curiam), *stay denied*, 456 U.S. 902 (1982), the court, in deciding which potential plan to implement after the Attorney General objected to the redistricting plans for the Texas legislature,

took notice that no potential plan had been precleared. Therefore, the choice was between various unprecleared plans. The court's reasoning suggests that had one of the plans been precleared, it would have been chosen.

Lower courts have also enjoined elections from being held under unprecleared plans when the Attorney General has not made a final determination, *e.g.*, *Herron v. Koch*, 523 F. Supp. 167 (E.D.N.Y. 1981) (three-judge court) (per curiam), or when a preclearance action is pending in the District Court for the District of Columbia. *E.g.*, *Heggins v. City of Dallas*, 469 F. Supp. 739 (N.D. Tex. 1979) (three-judge court).

Additionally, courts have consistently reasoned that an unprecleared plan, if it must be implemented on an interim basis, should be modified to respond to the Attorney General's concerns. *E.g.*, *Terrazas v. Clements*, 537 F. Supp. 514, 539, 547 (N.D. Tex.) (three-judge court) (per curiam), *stay denied*, 456 U.S. 902 (1982); *Burton v. Hobbie*, 543 F. Supp. 235, 239 (M.D. Ala.) (three-judge court), *aff'd*, 459 U.S. 961 (1982). The *Campos* court, however, engaged in no such modification.

If the district court felt that it did not have time to order plan #3 into effect, it could have ordered the election to take place under the malapportioned plan #1 under its emergency power exercised in one-person, one-vote cases. *See, e.g.*, *Ely v. Klahr*, 403 U.S. 108 (1971) (malapportioned state legislative redistricting plan used temporarily); *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967) (per curiam) (district court upheld in allowing election under unconstitutional plan).

A good illustration of such reasoning in the context of the Voting Rights Act is *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss.) (three-judge court) (per curiam), *aff'd in part and vacated in part*, 112 S.Ct. 412 (1991). The district court in *Watkins* ordered elections held under a preexisting unconstitutional plan as an interim measure rather than under a plan fashioned by the court after the Attorney General objected to the legislatively passed plan.

In keeping with both legislative intent and precedent, courts need to remain firm on the use of interim plans. The practical necessity for this rigidity can be seen in that by the time the Fifth Circuit overturned the district court for abusing its discretion in implementing the unprecleared plan, the election was over and the damage done. Since it is difficult to get a new election ordered, invalid schemes will remain in place for that election. In *Campos*, for instance, a three-judge panel recently declined to order a new election. *United States v. City of Houston*, Nos. 91-3076, 91-3117, 1992 WL 232359 (S.D. Tex. August 21, 1992) (three-judge court). District courts must make an initial correct decision on interim plans or the Voting Rights Act will be effectively circumvented.

*Campos* has already been cited as authority for allowing an election to proceed under a plan to which the Attorney General has interposed an objection. *Lopez v. Hale County*, 1992 U.S. Dist. Lexis 13217, at *16 n.7 (N.D. Tex. Sep. 1, 1992) (three-judge panel), *stay denied*, 61 U.S.L.W. 3253 (U.S. Sep. 30, 1992). This Court must act to preserve the Voting Rights Act by preventing any further application of the *Campos* decision.

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# Appendix

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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No. 91-6100.

JESSE CAMPOS, W.R. (RESENDEZ) MORRIS, AND MEXICAN AMERICAN BAR ASSOCIATION OF HOUSTON, PLAINTIFFS-APPELLANTS,

v.

CITY OF HOUSTON, *ET AL.*, DEFENDANTS-APPELLEES.

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Appeal from the United States District Court for the Southern District of Texas

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July 31, 1992

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Frumencio Reyes, Jr., Reyes & Reyes-Castillo, P.C., Frank Alvarez, Jr., Houston, Tex., Judith A. Sanders-Castro, San Antonio, Tex., for plaintiffs-appellants.

Miriam R. Eisenstein, David K. Flynn, Attys., Dept. of Justice, Washington, D.C., for amicus-U.S.

C. Robert Heath, Steve Bickerstaff, Sydney W. Falk, Jr., Myra A. McDaniel, Bickerstaff, Heath & Smiley, Austin, Tex., for City of Houston.

Michael J. Zomcik, Bonham, Carrington & Fox, Houston, Tex., for amicus-Clymer Wright.

Before GOLDBERG, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:

On our own motion, we withdraw our prior opinion reported at 960 F.2d 26, and substitute the following:

The district court required that the November 1991 Houston City Council election be conducted under a reapportionment plan objected to by the Attorney General of the United States. Because we find that the district court abused its discretion, we VACATE the judgment of the district court and REMAND the case for such further proceedings, if any, that may be necessary.

I

In 1979, the City of Houston adopted a form of government consisting of a fifteen-member council, including the mayor, who is also a member of the council ("Plan 9-5-1 # 1). All are elected for concurrent two-year terms. Nine of the council members are elected from single-member districts; six, including the mayor, are chosen at large.

In April 1991, the Hispanic citizens filed suit against the City, alleging that the at-large elections for council members dilute Hispanic voting strength in violation of Section 2 et seq. of the Voting Rights Act of 1965 (as amended), 42 U.S.C. § 1973 et seq., and the Fourteenth Amendment to the United States Constitution. The Hispanic citizens asked the district court to enjoin all future elections under the at-large scheme and to order into effect a 22-member City Council. The City of Houston moved for summary judgment; that motion is pending before the district court.

Meanwhile, 1990 census data had revealed that the nine single-member districts in Plan 9-5-1 # 1 were significantly unequal in population, in violation of the one-person, one-vote requirements of the Fourteenth Amendment. Accordingly, on June 5, 1991, the City of Houston adopted a redistricting plan for the nine single-member districts, using 1990 census data ("Plan 9-5-1 # 2"). On that same day, the City also adopted an alternative redistricting plan consisting of sixteen single-member districts, which was to be implemented if an August 10 charter revision election on the issue was successful. On July 9, the City submitted both alternative plans to the Attorney General of the United States, as required by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. In the August 10 City Charter revision election, the sixteen single-member district alternative reapportionment plan was rejected by the voters; therefore, the Attorney General did not consider that alternative.

On August 21, the Attorney General requested more

information regarding Plan 9-5-1 # 2. The Attorney General requested that the City respond to specific allegations that the Department of Justice had received from the Hispanic community in Houston that the plan discriminated against them. The City made several responses to the Attorney General's request, but did not complete its submission until September 27. The City proceeded with steps to implement the unprecleared Plan 9-5-1 # 2 in preparation for the scheduled November 5 election.

On October 4, the Attorney General interposed a timely objection to the proposed Plan 9-5-1 # 2 pursuant to Section 5 of the Voting Rights Act. On October 7, the City filed a motion for leave to file a supplemental counterclaim against the Hispanic citizens in the Section 2 action. In the counterclaim, the City asked for a declaration regarding the constitutionality of the malapportioned Plan 9-5-1 # 1, and requested that the district court order that Plan 9-5-1 # 2 (the plan to which the Attorney General had objected) be used as an interim plan for the November 5 City Council elections. The United States Attorney General moved to participate as an *amicus* and filed a detailed brief objecting to the jurisdiction of the court. At a hearing on October 9, the City presented testimony from election officials that it would be physically impossible to hold the November 5 election under any plan other than Plan 9-5-1 # 2, the one objected to by the Attorney General. At the conclusion of that hearing, the court directed the parties to meet and attempt to settle the issues. The hearing was continued until October 11.

A few hours before the October 11 hearing, the Houston City Council adopted an entirely different plan of apportionment of the nine single-member council districts ("Plan 9-5-1 # 3"), and immediately submitted it to the Department of Justice via telefax for preclearance. At the hearing that afternoon, counsel for the City announced to the district court that the City had been unable to reach an agreement with the Hispanic citizens. However, the City urged the court to adopt Plan 9-5-1 # 3 as an interim plan pending preclearance.

At the conclusion of the hearing, the court stated that it had three plans before it: (1) the malapportioned Plan 9-5-1 # 1, under which members of the Houston City Council were elected during the 1980s; (2) Plan 9-5-1 # 2, to which the Department of Justice had objected; and (3) Plan 9-5-1 # 3, which had been passed by the City Council only hours before the hearing. The City urged that the court not order it to use Plan 9-5-1 # 1, because it was based on the 1980 census and presumably had large population deviations among the districts. The Hispanic citizens opposed Plan 9-5-1 # 2, because it had been objected to by the Department of Justice. They did not support the new Plan 9-5-1 # 3, although they acknowledged that it was an improvement over Plan 9-5-1 # 2.

On October 12, before the district court issued its ruling, the Attorney General precleared Plan 9-5-1 # 3, subject to reconsideration in the event that new information came to his attention before the expiration of the sixty-day period within which he is allowed to object to plans

submitted by covered jurisdictions. A copy of the preclearance letter was sent by telefax to the district court. Later that afternoon, however, the district court ordered that the November 5 elections be conducted under unprecleared Plan 9-5-1 # 2. The court reasoned that, although Plan 9-5-1 # 3 had been precleared, it should not be used, because the Hispanic citizens objected to it, and the Attorney General might change his mind.

On October 16, the Hispanic citizens moved for a stay, which the district court denied the following day. On October 18, the Hispanic citizens sought a stay from this court, which was denied on October 24. The Hispanic citizens' request for relief from the United States Supreme Court was also denied.

On October 17, the United States filed a separate enforcement action against the City of Houston seeking to enjoin the November 5 election because it was proceeding under an unprecleared plan of apportionment. *United States v. City of Houston*, No. H-91-3076 (S.D.Tex.). In the alternative, the United States requested that special elections, under a precleared plan, be scheduled as soon as practicable. A three-judge panel was convened, and a hearing was set for October 28. On October 29, the three-judge panel refused to grant the injunction, noting:

> The Fifth Circuit's denial of a stay operated on the understanding that Judge Hittner's order represents a temporary expedient.... The City cannot plausibly contend on the one hand that Judge Hittner's order

> represents an *interim* plan and then on the other hand, aver that the office holders elected in next Tuesday's election will continue in office for the entire terms. As far as this court is concerned, the interim order of Judge Hittner, if affirmed by the Fifth Circuit, will require an election under a constitutional, precleared or court imposed districting scheme in far less than two years.

The Hispanic citizens timely appealed, and the United States filed an *amicus* brief supporting the Hispanic citizens' position.

II

The Hispanic citizens and the United States argue that the district court lacked jurisdiction or otherwise exceeded its authority in granting relief on the City's counterclaim because (1) the counterclaim did not present a justiciable "case or controversy"; and (2) the counterclaim is an action under Section 5 of the Voting Rights Act and, therefore, only a three-judge court authorized to decide Section 5 issues could have ordered the relief sought by the City. We conclude that the district court had the power to grant some form of interim relief, but that it abused its discretion in ordering the election to be conducted under unprecleared Plan 9-5-1 # 2, to which the Attorney General had interposed a timely objection.

A

The Hispanic citizens and the United States contend that the City's counterclaim did not present a justiciable case or controversy because the Hispanic citizens' Section 2 action related solely to the at-large seats, and they had not filed a malapportionment challenge to Plan 9-5-1 # 1. We disagree. Although the procedural context in which the counterclaim was filed is rather unusual, we conclude that the requirements of Article III were satisfied. Under state law, the City was required to conduct the election as scheduled; but the only precleared apportionment plan available after the Attorney General objected to Plan 9-5-1 # 2 was the malapportioned Plan 9-5-1 # 1 used during the 1980s. Had the City chosen to use Plan 9-5-1 # 1, it faced the very substantial likelihood of an injunctive challenge and postponement of the election, or later vacation of the election results. It therefore chose to file the counterclaim against the Hispanic citizens in the Section 2 action and obtain a declaration that Plan 9-5-1 # 1 was unconstitutionally malapportioned, thus clearing the way for a court-ordered plan for use in the impending election. Under the circumstances, we cannot say that the course chosen by the City necessarily was either improper or taken in bad faith, nor did the City's lawsuit prevent the Attorney General from proceeding to consider preclearance matters.

B

1

Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, covered jurisdictions, such as the City of Houston, may implement changes in voting procedures in only two ways: (1) by obtaining a declaratory judgment from the United States District Court for the District of Columbia that the proposed change does not have the purpose or effect of abridging the right to vote on account of race; or (2) by submitting the proposed change to the Attorney General for preclearance. Challenges to an objection by the Attorney General may be heard only by the District Court for the District of Columbia. *E.g.*, *Perkins v. Matthews*, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971). However, Section 5's "preclearance requirements [do] not apply to plans prepared and adopted by a federal court to remedy a constitutional violation." *McDaniel v. Sanchez*, 452 U.S. 130, 138, 101 S.Ct. 2224, 2230, 68 L.Ed.2d 724 (1981).

Section 5 states, in pertinent part, that "[a]ny action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28...." 28 U.S.C. § 2284(a) provides:

> A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or

> the apportionment of any statewide legislative body.

Because this is not an action challenging either a congressional apportionment scheme or a state-wide apportionment scheme, it falls within § 2284(a), thus requiring a three-judge court, only if the action is one "under" Section 5. Furthermore, we should note that a three-judge court convened under Section 5 is a court of limited jurisdiction and limited authority. In *United States v. Board of Supervisors*, 429 U.S. 642, 645, 97 S.Ct. 833, 834, 51 L.Ed.2d 106 (1977), the Supreme Court held that "[a]ttempts to enforce changes that have not been subjected to [section 5] scrutiny may be enjoined by any three-judge district court in a suit brought by a voter ... or by the Attorney General on behalf of the United States." "Enforcement" only includes the determinations whether a voting change is covered by Section 5, whether the preclearance requirements have been met and, if they have not, what remedy is appropriate. *Id.*

2

The City contends that its counterclaim is not an "action under" Section 5 because it did not challenge the merits of the Attorney General's objection to Plan 9-5-1 # 2, and did not seek to have the district court order Plan 9-5-1 # 2 to be used as the *permanent* plan for the 1990s. Each underlying point is correct. Because the City asked that the unprecleared Plan 9-5-1 # 2 be used as an *interim* plan for the November 5 election, the City did not seek relief that necessarily would circumvent preclearance

requirements. Instead, the City sought to alleviate the difficult situation it faced after the electorate had rejected the sixteen single-member district plan and the Attorney General had objected to Plan 9-5-1 # 2. Thus, we believe the question is not whether the district court's jurisdiction and the Attorney General's Section 5 responsibility are in conflict; rather, the question is under what conditions did the court have the authority to order an interim election, notwithstanding an unresolved Section 2 case and the absence of a precleared redistricting plan.

As the Attorney General acknowledges, the district court had the authority to order some form of emergency relief. *See* Brief for the United States as Amicus Curiae, pp. 18-19 (district court had power to enjoin election pending preclearance of a new plan; to devise its own plan, correcting the objections raised by the Attorney General to the prior submission; or to adopt precleared Plan 9-5-1 # 3); *see also Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982). To hold, as the plaintiffs urge, that the district court "lacked jurisdiction" to adopt--as only an interim measure--the plan to which the Attorney General had initially objected creates unacceptable tensions with the consistently-recognized discretion of the district court to formulate and authorize the implementation of interim election plans in voting rights cases. *See, e.g., McDaniel v. Sanchez*, 452 U.S. 130, 101 S.Ct. 2224, 68 L.Ed.2d 724 (1981); *Connor v. Finch*, 431 U.S. 407, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977). Such a holding is further objectionable because, illogically, it would make *jurisdiction* depend upon the relief ultimately ordered by the court. Courts cannot

operate under such *post hoc* rules.

Second, although whether and why the Attorney General has objected to a certain plan are very relevant factors for the Section 2 court to consider, alone they cannot preclude the court from using that plan as an interim measure. The Attorney General's objection or lack thereof does not necessarily indicate that the plan is constitutional or unconstitutional: it simply means that the plan has not met the necessary procedural requirements. Under appropriate circumstances, even an unconstitutional plan may be implemented on an interim basis. *Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982). Moreover, as far as Section 5 is concerned, there is no distinction between a plan to which the Attorney General has objected and a plan that has not been submitted to the Attorney General at all: in either case Section 5 has not been satisfied. Thus, in deciding whether the court has authority to act, a determination cannot be rationalized on the basis of the Attorney General's filing or failure to file an objection. The plaintiffs' jurisdictional argument thus stands in conflict with the scope of authority that Section 2 courts have traditionally possessed.

Third, in view of the decidedly limited jurisdiction of three-judge courts, it is unclear why a three-judge court can decide, as the plaintiffs suggest, what kind of interim relief is necessary during the pendency of a Section 2 action. A three-judge court is required only to decide whether Section 5 applies, and if so, whether it has been satisfied. Section 2 does not require three-judge courts

when statewide apportionment schemes are not at issue, yet the plaintiffs' position would require their intervention in Section 2 cases on a wide scale.

Finally, the problems in a "jurisdictional" analysis of a Section 2 court's interim election order become apparent when one considers the daunting variety of procedural issues that might arise from interrelating single-judge and three-judge court functions. All of these reasons persuade us of the lack of merit of a jurisdictional objection to the City's counterclaim.

3

Notwithstanding that the district court had jurisdiction to grant interim relief, however, we conclude that on the facts of this case that it abused its discretion. After the Attorney General objected to Plan 9-5-1 # 2, there were several alternatives available to the district court: (1) it could have enjoined the use of Plan 9-5-1 # 1 and enjoined the election pending preclearance of a new plan; (2) it could have devised its own plan, perhaps responding to the objections raised by the Attorney General to Plan 9-5-1 # 2; or (3) it could have ordered that the election be conducted under Plan 9-5-1 # 3, which the Attorney General conditionally precleared at the last minute, and which the City supported. The district court offered weak reasons for *refusing* to order an election under the belatedly precleared Plan 9-5-1 # 3 and thus for ignoring the Justice Department's role in the redistricting process. Contrary to the district court's proffered rationale, the Hispanic citizens' objection to Plan 9-5-1 # 3 cannot

have been significant, because they also objected to Plan 9-5-1 # 2, which the court adopted. That some changes in local voting procedures were necessary is likewise no reason to refuse Plan 9-5-1 # 3, because the City agreed to that plan and urged its adoption notwithstanding such difficulties. In short, the district court's preference for Plan 9-5-1 # 2, instead of Plan 9-5-1 # 3, apparently was guided more by *its* preference than by the significant factors of Justice Department conditional preclearance and City support for Plan 9-5-1 # 3. We cannot approve the district court's unsupported choice, given the available alternatives.

C

Our holding is narrow and fact-bound. We reiterate that a court-ordered reapportionment plan is not subject to the preclearance requirements of Section 5. *See McDaniel v. Sanchez*, 452 U.S. at 138, 101 S.Ct. at 2230. Further, elections may be held under exigent circumstances under a plan to which the Attorney General has objected. *See Clark v. Roemer*, --- U.S. ----, ----, 111 S.Ct. 2096, 2102, 114 L.Ed.2d 691 (1991). When, however, the district court does not fashion its own plan as an interim measure, and it *rejects*, without adequate reasons, a precleared plan in favor of a legislative plan that has not been precleared, it abuses its discretion in awarding interim relief.

III

The district court abused its discretion in awarding interim relief and, thus, we VACATE the October 12th

order. The parties have not requested that we set aside the November 5 election results. This opinion should not be construed as having any such an effect, nor should it be construed as requiring the district court to order new elections under a different plan. We REMAND the case for further proceedings as the district court deems necessary, which should not be inconsistent with this opinion.

VACATED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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Civil Action No. H-91-885.

JESSE CAMPOS, W.R. (RESENDEZ) MORRIS,
AND MEXICAN AMERICAN BAR ASSOCIATION
OF HOUSTON, PLAINTIFFS,

V.

CITY OF HOUSTON, *ET AL.*,
DEFENDANTS.

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ORDER, Oct 12, 1991

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Frumencio Reyes, Jr., Reyes & Reyes-Castillo P.C., Houston, Tex., for plaintiffs.

Myra A. McDaniel, Bickerstaff, Heath & Smiley, Austin, Tex., for defendants.

John D. Lenoir, Asst. U.S. Atty., Houston, Tex., for John R. Dunne, Asst. Atty. Gen., Civ. Rights Div., Dept. of Justice.

Wayne Fox, Michael J. Zomcik, Bonham, Carrington & Fox, P.C., Houston, Tex., for Clymer Wright and Citizens for Term Limitation.

Barry Barnes, Barnes & Turner, Houston, Tex., for Mayoral Candidate Sylvester Turner.

HITTNER, District Judge:

Pending before this Court is a supplemental counterclaim (attached to Document # 24) and first amended supplemental counterclaim (filed October 10, 1991) filed by the defendant City of Houston ("the City"). The parties appeared before the Court on October 9, 1991, at 10:00 a.m. for a scheduled hearing on the counterclaim. Additionally, the Court granted leave for two nonparties to participate in the hearing: Clymer Wright, who filed a motion to intervene on behalf of himself and other voters supporting Citizens for Term Limitation, and the United States Department of Justice. The parties subsequently appeared before the Court on October 11, 1991, at 1:30 p.m. for a continuation of the aforementioned hearing. At that time, the Court additionally granted leave for nonparty and mayoral candidate Sylvester Turner to participate in the hearing. The Court has considered the counterclaim, the submissions of the parties, the argument of counsel, the testimony in open court, and the applicable law.

## STATEMENT OF FACTS

In 1979 the City of Houston adopted the current system of nine councilmembers elected from

single-member districts, five councilmembers elected at-large, and the mayor elected at-large ("9-5-1 plan # 1"). After the 1990 federal census data was published, the City Council of the City of Houston formally determined through Ordinance 91-282 enacted on February 27, 1991, that the population of the existing council districts was "materially imbalanced." See Defendant's Exhibit 5. In April 1991, the plaintiffs, Mexican-American and Hispanic residents of Houston and the Mexican American Bar Association of Houston, originally filed this cause of action challenging the "at-large" portion of the City's scheme for electing members of the City Council. Plaintiffs brought the instant lawsuit pursuant to 42 U.S.C. §§ 1971, 1973, 1983, 1988 and the Fourteenth and Fifteenth Amendments to the United States Constitution. Plaintiffs sought a permanent injunction prohibiting the City from holding any future elections for City Council under the 9-5-1 plan # 1. See Document # 3.

On June 5, 1991, the City Council adopted Ordinance 91-794, re-drawing the nine single-member districts to be of approximately equal population size. The Council alternatively proposed to change the City Council's structure to a council of 16 members elected from single-member districts, 6 members elected at-large, and a mayor elected at-large ("the 16-6-1 plan"). The City submitted both the new, proposed 9-5-1 plan ("9-5-1 plan # 2") and the 16-6-1 plan to the United States Attorney General for preclearance pursuant to the Voting Rights Act § 5. 42 U.S.C. § 1973c (1965). The Attorney General's review of the 16-6-1 plan, however, was contingent upon voter approval of this plan pursuant to Texas state law.

On August 10, 1991, the voters of the City of Houston rejected the 16-6-1 plan. Thus, the Attorney General reviewed only 9-5-1 plan # 2. On August 21, 1991, the Attorney General made a written request for additional information regarding 9-5-1 plan # 2. The City began responding to the request on August 29, 1991, and the submission was complete by September 27, 1991.

Late in the afternoon on Friday, October 4, 1991, Assistant Attorney General John R. Dunne transmitted a letter to the City denying preclearance and interposing an objection to 9-5-1 plan # 2 under the Voting Rights Act § 5. Dunne concluded that the City had failed to sustain its burden under § 5 that the "submitted change has neither a discriminatory purpose nor a discriminatory effect." See Defendants' Exhibit # 8. The City's recourse under § 5 was threefold: (1) ask the Attorney General to reconsider the objection, (2) seek a declaratory judgment from a three-judge panel of the United States District Court for the District of Columbia, or (3) abandon the plan. 42 U.S.C. § 1973c (1965). The City informed the Court that it has abandoned 9-5-1 plan # 2 as a *permanent* redistricting plan.

Currently, no viable plan exists to govern the November 5, 1991 elections for the Houston City Council. The City determined last February, and conceded in open court, that the districts under 9-5-1 plan # 1 are malapportioned. The City cannot itself implement 9-5-1 plan # 2 because of the Attorney General's objections. Two other plans proposed are not currently available for interim use in the November 5 election. To enable the

November 5 election to proceed as scheduled, the City filed the instant supplemental counterclaim requesting this Court to designate the districts drawn in 9-5-1 plan # 2 as an interim plan for this election only. Additionally, at the October 11, 1991 hearing, both parties asked this Court to determine whether a referendum regarding a 16 single-member district plan ("the 16-1 plan") should be included on the November 5, 1991 ballot in the event that the Court enters an interim plan.

## POWER OF THE COURT TO ENTER AN INTERIM PLAN

Reapportionment is primarily a legislative responsibility. Federal judicial relief becomes appropriate, however, when the legislative body "fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Upham v. Seamon*, 456 U.S. 37, 41, 102 S.Ct. 1518, 1521, 71 L.Ed.2d 725 (1982) (quoting *White v. Weiser*, 412 U.S. 783, 794-795, 93 S.Ct. 2348, 2354-2355, 37 L.Ed.2d 335 (1973)). In Houston, the City Council bears the first responsibility for redistricting under the existing 9-5-1 council structure mandated by the city charter. The Council's efforts to redraw the single-member districts, reflected in Ordinance 91-794, failed under § 5 scrutiny. The legislative body, the City Council, has therefore failed to reapportion in accordance with the Voting Rights Act § 5 and the United States Constitution. Under such circumstances, this Court functions as a court of equity charged with fashioning interim relief. *Watkins v. Mabus*, 771 F.Supp. 789, 798 (S.D.Miss.1991) (Barksdale, Circuit

Judge, and Lee and Pickering, District Judges), *stay pending appeal denied*, (U.S.Sup.Ct. Aug. 20, 1991) (holding that "[t]he application for injunction and stay pending appeal presented to Justice Scalia and by him referred to the Court is denied," although Justices Marshall and Blackmun noted that they would grant the application). *See also Terrazas v. Clements*, 537 F.Supp. 514 (N.D.Tex.1982) (3-judge court) (Court ordered the 1982 election for the Texas legislature to proceed according to modified unprecleared plan).[1] The three-judge panel in *Watkins* recently faced a dilemma much like that which this Court faces now. The State was without a constitutional plan for the 1991 election of the Mississippi Legislature. *Id.* at 806. The Mississippi general elections scheduled for November 5, 1991 were imminent and did not permit an opportunity for preclearance of a constitutional plan. *Id.* at 802, 806. In their *per curiam* opinion, the panel determined that it was essential for the Court to exercise its equitable powers to implement an interim plan. *Id.* at 806. This Court, too, determines that in the absence of a constitutional plan and in the face of imminent elections, equity demands an interim plan.

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[1] A three-judge panel is required "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a) (1960). Because the instant case involves a citywide election, a three-judge panel need not be convened.

## THE OPTIONS BEFORE THE COURT

In fashioning interim relief, this Court should consider the proximity of the impending election and the mechanics of the election laws, and should rely upon general equitable principles. *Reynolds v. Sims*, 377 U.S. 533, 585-587, 84 S.Ct. 1362, 1393-1395, 12 L.Ed.2d 506 (1964); *Terrazas*, 537 F.Supp. at 538. If time does not permit a court to itself create a plan that meets the standards of the Voting Rights Act § 2, that court should consider the options already available. *Watkins* at 800. The Supreme Court has at times authorized district courts to permit elections to proceed under interim districting plans "that do not in all respects measure up to the legal requirements, even constitutional requirements." *Upham*, 456 U.S. at 44, 102 S.Ct. at 1522; *Watkins* at 802; *Terrazas*, 537 F.Supp. at 538.

Time does not permit this Court to either design its own plan or receive extensive proof on the issue of the best interim plan. The election is imminent, absentee balloting is scheduled to begin in four days, and the county and city's election machinery is in progress. As in *Watkins*, this Court is faced with "an exceptionally expedited schedule and a shortage, if not lack, of acceptable options." *Id.* at 804. The Court's options for an interim plan, none of which is ideal, include: 9-5-1 plan # 1, other recently-proposed plans, and 9-5-1 plan # 2.

*First Option: 9-5-1 Plan # 1*

As a general rule, 9-5-1 plan # 1 would remain in effect until a new plan is precleared by the Attorney General. *City of Rome v. United States*, 446 U.S. 156, 182, 100 S.Ct. 1548, 1564, 64 L.Ed.2d 119 (1980). The plaintiffs asked this Court to enjoin the use of 9-5-1 plan # 1 when they filed this lawsuit. The City conceded in open court that 9-5-1 plan # 1's single-member districts now violate the one-person, one-vote principle. The Court thus determines, based upon the City's representations, that injunctive relief is appropriate concerning 9-5-1 plan # 1.

*Second Option: Other Proposed Plans*

Two other plans were proposed to the Court for use as an interim plan. First, the plaintiffs suggested a plan with 16 single-member districts. The 16-1 option is a variation of the 16-6-1 plan that the voters refused to approve in the citywide referendum. Second, last-minute City Council sessions resulted in yet another 9-5-1 plan ("9-5-1 plan # 3") passed yesterday, October 11, 1991. According to testimony, 9-5-1 plan # 3 would have the effect of pairing two incumbents and potentially jeopardizing a current African-American district. The plaintiffs informed the Court that they oppose 9-5-1 plan # 3, as well as any plan other than 16-1. The plaintiffs indicated in open court an intent to formally present their opposition to 9-5-1 plan # 3 to the Department of Justice, but they have not yet had the opportunity.

The City forwarded 9-5-1 plan # 3 to the Attorney

General for expedited § 5 preclearance prior to the hearing on October 11, 1991, with no advance notice to this Court. This morning, less than two hours before this order was scheduled to issue, the Department of Justice notified the Court by facsimile transmission that 9-5-1 plan # 3 had received tentative approval. Specifically, the Assistant Attorney General's letter reads, in part, as follows:

> The Attorney General does not interpose any objection to the specified change [9-5-1 plan # 3]. However, we note that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period.

The sixty-day statutory review period does not expire until approximately December 10, 1991, a date which is later than both the scheduled general election and the anticipated run-off election.

This Court does not dispute that either 16-1 or 9-5-1 plan # 3 may be a viable plan. Yet, given the circumstances, the Court cannot adequately review those plans unless the Court reopens filing deadlines and/or postpones absentee (mail) and early balloting.

*Third Option: 9-5-1 Plan # 2*

Candidate filing for the positions of mayor, comptroller, and members of the council, which closed on September 23, 1991, was conducted under the unprecleared 9-5-1 plan # 2. Early absentee ballots were scheduled to have been mailed on October 7, 1991, but were held after the Attorney General denied preclearance. Early (absentee) balloting is scheduled to begin October 16, 1991.

Only 9-5-1 plan # 2 will enable the elections to proceed as scheduled. The 9-5-1 plan # 2 *is not a retrogression;* that is, it does not place Hispanic voters in a worse position than 9-5-1 plan # 1. Ideally, the Court could modify the plan, on an interim basis, in an attempt to address the Attorney General's objection, but the general nature of the objection and time constraints realistically preclude this modification.

THE INTERIM PLAN

Despite the Attorney General's preclearance of 9-5-1 plan # 3 less than two hours ago, this Court implements the 9-5-1 plan # 2 on an interim basis to insure that the 1991 election will proceed on schedule. Testimony of the County Clerk of Harris County established that, were 9-5-1 plan # 3 to be used, a separate, delayed city election would be inevitable, and lower voter turnout would result. The goals to maximize voter turnout and to minimize voter confusion and taxpayer cost would be thwarted by the delay occasioned in implementing the 9-5-1 plan # 3 at this time. Further testimony revealed that

at this point, *any* change in the electoral scheme would necessitate a separate city election at considerable expense to the City.[2]

This Court, in considering the best interests of the voters of the City, finds that the election should proceed as scheduled. Holding the election on a timely basis will result in the highest possible voter turnout, the least voter confusion, and a savings to the City of approximately $350,000. Therefore, the Court finds that 9-5-1 plan # 2 is the best option available at this time.

The Court stresses that it is implementing 9-5-1 plan # 2 as interim relief only. The question of what council structure would best satisfy § 2 of the Voting Rights Act for a permanent plan is not at issue. *Watkins* at 806.

## CONCLUSION

While the Court recognizes the last minute efforts of all parties to reach a compromise, those unsuccessful efforts have now required this Court to address the foregoing options with regard to the November 5, 1991 elections. As in *Watkins*, this Court exercises its equitable power to insure a timely election, as the voters of the City of Houston should not be placed at a disadvantage by legal or political maneuvering. All voting for the November 5,

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[2] The City Secretary testified that the cost of a separate city election is approximately $750,000. For the city to hold its election jointly with the state, the cost is $400,000.

1991 elections must proceed timely and can do so *only* under an interim use of 9-5-1 plan # 2.

Based on the foregoing, with respect to an interim plan, the Court

ORDERS that:

(1) Plaintiffs' request for preliminary injunction is GRANTED to the following extent: the City of Houston is ENJOINED from using 9-5-1 plan # 1 (the existing 9-5-1 plan) to conduct the November 5, 1991 City elections;

(2) 9-5-1 plan # 2 is to be utilized as an interim plan to enable the November 5, 1991 elections to proceed. Those persons elected in the November 5, 1991 City Council election shall hold office until their successors are elected under a permanent apportionment plan (9-5-1 plan # 3 or otherwise) which complies with the Voting Rights Act and the United States Constitution.

Additionally, based upon the plaintiffs' objection to the 16-1 referendum, it is further ORDERED that the 16-1 referendum shall not appear on the November 5, 1991 ballot.

All other interim relief not specifically granted herein is denied.

SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. § 1973c (1988):

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in

contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

Supreme Court, U.S.
FILED
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No. 92-749

In The

# Supreme Court of the United States

October Term, 1992

JESSE CAMPOS, *ET AL.*,

*Petitioners,*

v.

THE CITY OF HOUSTON, *ET AL.*,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Does this Court have jurisdiction to hear a petition for writ of certiorari when the petitioners disagree only with the lower court's rationale and not with its decision?

2. Does this Court have jurisdiction to hear a petition for writ of certiorari when any potential relief is either moot or is barred by a final judgment from another court?

3. Does a district court have jurisdiction to consider a declaratory judgment counterclaim filed by a governmental body when the purpose of that counterclaim is to determine the validity of the existing election system and, if the existing system is invalid, to obtain an interim order to govern the conduct of an impending election?

4. Are there any circumstances in which a district court would have authority to order use of a redistricting plan that had not been precleared under section 5 of the Voting Rights Act when a precleared plan was available?

## LIST OF PARTIES

The list of parties set forth in the Petition for Writ of Certiorari is correct in regard to the petitioners. The list of respondents, however, does not reflect the substitution of successors in office after the November 1991 election. Accordingly, the list of respondents shown in the petition should reflect that Robert C. Lanier has replaced Kathryn Whitmire as Mayor and that Gracie Saenz, Judson Robinson III, and Helen Huey have replaced Beverly Clark, Margarette Robinson, and Larry McKaskle as members of the city council.

Throughout this brief in opposition respondents will be referred to collectively as "the City."

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

STATEMENT OF THE CASE ..... 2

Redistricting Background ..... 3

The City's 9-5-1 Options ..... 6

Attorney General's Review ..... 7

The City's Options and Response Regarding the November 1991 Election ..... 9

Post-election Events ..... 13

REASONS TO DENY THE PETITION ..... 14

I. The Court is Without Jurisdiction to Entertain the Petition for Writ of Certiorari Since the Petitioners Disagree Only With the Court of Appeals' Reasoning and Not With Its Decision ..... 14

II. Any Relief That Could be Granted in Response to This Petition is Barred Either by Mootness or the Final Judgment of the Three-Judge Court ..... 17

III. The Issue Presented in the Petition is Unlikely to Reoccur ..... 19

A. The case arises out of a highly unusual situation created by the interaction between the timing of the Attorney General's objection and the petitioners' opposition to any plan that the City had legal authority to adopt ..... 20

TABLE OF CONTENTS – Continued

Page

B. The Fifth Circuit opinion makes it unlikely that another district court would choose an objected-to plan as an interim remedy when a precleared plan was available ... 21

IV. There is No Important Question of Federal Law as the Opinion Below is Entirely Consistent with the Settled Law ..... 22

A. The case does not raise questions involving the scope of section 5 coverage..... 22

B. The district court had clear jurisdiction over the City's counterclaim..... 26

C. The petitioners raise no valid claim against the court of appeals' decision that the district court abused its discretion in adopting an unprecleared plan when a precleared plan was available ..... 28

CONCLUSION ..... 30

# TABLE OF AUTHORITIES

Page

CASES

*Campos v. City of Houston*, ___ U.S. ___, 112 S.Ct. 354 (1991) ..... 2, 5, 9

*Campos v. City of Houston*, 968 F.2d 446 (5th Cir. 1992) ..... 1, 2, 8, 24, 25, 27

*Campos v. City of Houston*, 776 F. Supp. 304 (S.D. Tex. 1991) ..... 17

*Canal Authority of State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974) ..... 17

*Clark v. Roemer*, ___ U.S. ___, 111 S.Ct. 2096 (1991) ..... 28

*Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980) ..... 15

*Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) ..... 26

*Gunn v. University Committee to End the War in Viet Nam*, 399 U.S. 383 (1970) ..... 15

*Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (3-judge court), *vacated and remanded for reconsideration in light of amendments to Voting Rights Act*, 461 U.S. 921 (1983) ..... 20

*Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151 (1934) ..... 15

*Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130 (1992) ..... 19

*Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941) ..... 26

*Montana v. Imlay*, ___ U.S. ___, 61 USLW 4001 (Nov. 3, 1992) ..... 19

TABLE OF AUTHORITIES – Continued

Page

*New York Telephone Co. v. Maltbie*, 291 U.S. 645 (1934) ..... 15

*Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984) ..... 12

*Public Service Commission v. Brashear Freight Lines*, 306 U.S. 204 (1939) ..... 15

*Public Service Commission v. Wycoff Co.*, 344 U.S. 237 (1952) ..... 26

*Radiofone, Inc. v. Federal Communications Commission*, 759 F.2d 936 (D.C. Cir. 1985) ..... 16

*Seamon v. Upham*, 536 F. Supp. 931 (E.D. Tex. 1982) (3-judge court), *affirmed sub nom., Upham v. Seamon*, 456 U.S. 37 (1982) ..... 26

*Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982), *application for stay denied*, 456 U.S. 902 (1982) ..... 21, 26

*United States v. City of Houston*, ___ F. Supp. ___, Nos. 91-3076, 91-3117, 1992 WL 232359 (S.D. Tex. Aug. 21, 1992) (3-judge court) ..... 3, 8, 9, 13, 18

*United States v. Board of Supervisors*, 429 U.S. 643 (1977) ..... 23

*Upham v. Seamon*, 456 U.S. 37 (1982) ..... 20, 26, 28

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) ..... 2

42 U.S.C. § 1973 ..... 10

42 U.S.C. § 1973c ..... 7, 22, 23

Tex. Loc. Gov't Code § 26.044 (Vernon Supp. 1992) ..... 5

28 C.F.R. § 51.37(c) ..... 8

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

Tex. Const. art. XI, § 5 ..... 5

No. 92-749

In The

# Supreme Court of the United States

October Term, 1992

JESSE CAMPOS, *ET AL.*,

*Petitioners,*

v.

THE CITY OF HOUSTON, *ET AL.*,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny the Petition For Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Fifth Circuit entered in *Jesse Campos, et al. v. The City of Houston, et al.*, 968 F.2d 446 (5th Cir. 1992).

## OPINIONS BELOW

Respondents rely upon Petitioners' recitation of the opinions below.

## JURISDICTION

Respondents agree with petitioners that jurisdiction, if it exists, is under 28 U.S.C. § 1254(1). As discussed in more detail below in the "Reasons to Deny the Petition," it is the City's position that no jurisdiction exists under article III to consider this petition since the petitioners seek nothing more than an advisory opinion and since there is no longer any relief that can be granted as a result of an appellate decision.

## STATEMENT OF THE CASE

The statement of facts presented in the petition for certiorari is materially incomplete. Although the thrust of the petitioners' argument is that the City of Houston engaged in "political machinations" designed to "undermine" the Voting Rights Act, *see* Petition at 2, they omit critical facts that are inconsistent with their allegation.[1]

[1] Although petitioners suggest that the issues in this case arise from an improper motive on the part of the City to undermine the Voting Rights Act, the courts that have previously reviewed this case have consistently declined to accept petitioners' interpretation of the facts. *E.g., Campos v. City of Houston*, ___ U.S. ___, 112 S.Ct. 354 (1991) (Scalia, J., in chambers) ("no reason to believe the City was acting in bad faith in the sense of seeking to frustrate the purposes of the Voting Rights Act."); *Campos v. City of Houston*, 968 F.2d 446, 450 and 451 (5th Cir. 1992) ("Under the circumstances, we cannot say that the course chosen by the City necessarily was either improper or taken in bad faith, nor did the City's lawsuit prevent the Attorney General from proceeding to consider preclearance matters."; " . . . the City did not seek relief that necessarily would circumvent preclearance requirements.

Most significantly, even though the petitioners claim that the City engaged in a subterfuge designed to have the district court reinstate the redistricting plan that had been objected to by the Attorney General, they fail to inform this Court of the most relevant fact of all – *i.e.*, that the City specifically requested that the district court not order use of the objected-to plan, but rather that it approve an alternative plan that had been crafted to cure the Attorney General's objection. The City, accordingly, believes it is necessary to expand significantly on the statement of the case found in the petition.

**Redistricting Background**

This case arises from the redistricting of the Houston city council to reflect population changes shown in the 1990 census. The petition, which is brought on behalf of several Hispanic citizens of Houston, correctly reflects the percentage of Hispanic population in the City of Houston, but it is important to be aware of the complete racial and ethnic composition of the City and the impact of the council structure and configuration on all groups protected by the Voting Rights Act. The City's composition is:

| | |
|---|---|
| African-American | 27.5% |
| Hispanic | 27.6% |

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Instead, the City sought to alleviate the difficult situation it faced after the electorate had rejected the sixteen single-member district plan and the Attorney General had objected to Plan 9-5-1 #2."); *United States v. City of Houston*, ___ F. Supp. ___, Nos. 91-3076, 91-3117, 1992 WL 232359 (S.D. Tex. Aug. 21, 1992) (3-judge ct.) slip op. at 8, n.6 ("There is no record of bad faith by the City . . . . ").

| | |
|---|---|
| Asian | 3.9% |
| Anglo/other | 40.6% |

After the 1990 federal census was released, the City conducted an extensive redistricting process with 13 public hearings. The process was designed to encompass not only the narrow issue of how council district boundaries should be drawn but also to consider whether the 9-5-1 structure[2] of the council should be changed in order to provide greater electoral opportunities to groups protected by the Voting Rights Act. A major factor in the redistricting analysis was the striking difference between Hispanic and African-American representation on the Council. Although both groups have virtually identical percentages of the City's population, at the time of the redistricting hearing, African-Americans held five of the 14 council seats, while Hispanics held only one. In particular, African-Americans held three of the five at-large seats, while at that time no Hispanic had been elected to an at-large council position.[3]

Representatives of the two minority groups had differing views on what council structure was preferred. Hispanic witnesses generally favored an expansion of the council to increase the number of single-member districts since a larger number of districts would produce districts with smaller populations, which in turn would make it

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[2] There are nine single-member council districts, five at-large council positions, and a mayor who is also elected at-large.

[3] At the election held in November 1991, an Hispanic was elected to an at-large council seat formerly held by an African-American. Thus, the council now has two Hispanics (one elected from a district and one elected at-large) and four African-Americans (two elected from districts and two elected at-large).

possible to draw more districts with Hispanic majorities. Hispanic witnesses also preferred the elimination of the at-large seats. As African-Americans had been very successful in being elected to the at-large positions, African-American witnesses tended to favor retention of the at-large seats.

In an attempt to accommodate the views of both groups, the City determined that the structure of the council should be expanded to a 16-6-1 configuration.[4] This option would produce the number of single-member districts sought by Hispanic witnesses while retaining the at-large component that had produced the election of several African-American members of the council. This alteration of the council structure, however, required amendment of the city charter which can be accomplished only by a vote of the people. *See* Tex. Const., art. XI, § 5; Tex. Loc. Gov't Code, § 26.044 (Vernon Supp. 1992). Thus, on June 5, 1991, the City adopted two sets of district boundaries. A sixteen-district plan was adopted to be effective if the voters approved the 16-6-1 option in an election to be held on August 10, 1991. Additionally, a nine-district plan was approved[5] to be effective only if the 16-6-1 referendum was not passed.

---

[4] Sixteen single-member council districts, six at-large council positions, and a mayor elected at-large.

[5] Under the terminology adopted by the district court in *Campos v. City of Houston*, this 9-5-1 plan became known as Plan 2. The terminology adopted by the district court and used in the Fifth Circuit, in the petition, and in this brief in opposition is:

> **Plan 1** – the preexisting plan that had been drawn on the basis of the 1980 census.

## The City's 9-5-1 Options

In determining the configuration of the nine single-member districts in the 9-5-1 plan, the city council had to decide whether it was preferable to adopt a plan with only one, but a presumably safe, Hispanic district or to choose a plan with two Hispanic districts, although both might be marginal.[6] There was no clear answer as to which option would better comply with the purposes of the Voting Rights Act and, in particular, with the goal of assuring equal electoral opportunity for Hispanic voters. Testimony by Hispanic witnesses at the public hearings had consistently indicated that only one Hispanic district could be drawn in any nine-district plan.[7]

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**Plan 2** – the plan adopted on June 5, 1991, and objected to by the Attorney General on October 4, 1991. This plan included one strong, predominantly Hispanic district, and was the one ordered for use as an interim plan by the district court.

**Plan 3** – the plan adopted on October 11, 1991, in response to the Attorney General's objection and precleared the next day. This plan had two predominantly Hispanic districts, but the Hispanic majorities were more marginal than in Plan 2.

[6] This is apparent from an examination of the plan that was ultimately adopted with two predominantly Hispanic districts. In that plan Hispanics constituted 50.5% of the voting age population in one district, but only 27.3% of the district's registered voters.

[7] The testimony was offered in the context of whether the size of the council should be increased. The testimony essentially was that a larger council was required since a nine-district structure did not offer the option of drawing two Hispanic districts.

Additionally, on May 6, 1991, which was one week before the council was to select a plan to present for public comment, the Department of Justice objected to proposed Dallas city council districts as having Hispanic voting age populations that were too low to assure the opportunity to elect a candidate of Hispanic choice. The Dallas districts that were rejected by the Department as being too weak were stronger, in some respects, than could be created in Houston under the two-Hispanic-district option. Accordingly, the City of Houston chose to proceed with the option containing one strong Hispanic district rather than an option containing two districts with potentially tenuous Hispanic majorities.

**Attorney General's Review**

The two alternative plans (*i.e.*, the 16-6-1 plan and the 9-5-1 plan containing one predominantly Hispanic district) were submitted to the Attorney General of the United States on July 8, 1991, for his review under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The City's submission letter requested expedited consideration and pointed out that candidate filing was required by state law to begin August 21, 1991, and close on September 23, 1991, and that the election was scheduled for November 5, 1991.

On August 10, 1991, the 16-6-1 proposal was defeated by the voters. This left the 9-5-1 Plan 2 as the operative plan. On August 21, 1991, the day candidate filing was required by law to begin, the Attorney General requested additional information from the City. That information

was provided on August 29, 1991.[8] The effect of this request for additional information was to give the Attorney General an additional 60 days to review the submission. 28 C.F.R. § 51.37(c). The City notified the Attorney General that if any changes in the redistricting plan were to be required as a result of the Attorney General's review, it would be necessary to know by September 15 so that necessary alterations could be made prior to the statutorily imposed September 23 filing deadline. On Friday, October 4, 1991, at approximately 6:00 p.m., the Attorney General imposed an objection to the 9-5-1 plan as he essentially concluded that the City should have chosen a plan that contained two districts with Hispanic majorities.

Throughout this and the collateral three-judge court litigation, *United States v. City of Houston*, ___ F. Supp. ___, Nos. 91-3076, 91-3117, 1992 WL 232359 (S.D. Tex.) (3-

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[8] The Fifth Circuit stated and the petitioners allege that the City's submission was not complete until September 27, 1991. Petition at 3; *Campos v. City of Houston*, 968 F.2d 446, 448-449 (5th Cir. 1992) (Petition at A-4). As is typical during the review of major submissions, the Department asked several questions during the process and gave the City the opportunity to respond to allegations made by persons opposing preclearance. The last response to this type of inquiry was on September 27, 1991, and to that extent, the submission was complete on that date. Under the regulations promulgated by the Attorney General, however, the submission was complete for the purpose of measuring the time limits for the Attorney General's review on August 29, 1991, when the City responded to the Attorney General's request for additional information. 28 C.F.R, § 51.37(c). While the City attempted to obtain an earlier determination by the Attorney General, it does not contend that the decision was outside the time limits provided by law.

judge court), the City and the Department of Justice have disagreed regarding the facts relating to the timeliness of the City's submission and of the Attorney General's review. To the extent that those facts have current relevance, they were summarized by the three-judge court when it said:

> There is no record of bad faith by the City, and the Justice Department's tardiness indicates no more than bureaucratic inertia. Redistricting to accomodate the then-controversial 1990 census results was difficult for all parties to the process. Assessing blame might have been relevant as part of the balancing of equities *prior to* the election (cf. order of Scalia, J., ___ U.S.L.W. ___ [)], but it serves no point at this late date.

*United States v. City of Houston*, ___ F. Supp. ___, Nos. 91-3076, 91-3117, 1992 WL 232359 (S.D. Tex. August 21, 1992) slip op. at 8 n.6 (emphasis in original).[9] The City's basic point is not to assess blame but rather is to make it clear that the timing of the objection, no matter whose fault it was, put the City in a difficult position and limited the available courses of action.

**The City's Options and Response Regarding the November 1991 Election**

Due to the timing of the objection, the City had no good options. It did not have authority under state law to

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[9] The reference in the quotation to the order by Justice Scalia is to his opinion on October 29, 1991, denying the application for injunction and stay in this case. ___ U.S. ___; 112 S.Ct. 354 (1991).

halt the election. In light of the Attorney General's objection, it could not continue to conduct the election on the basis of Plan 2. The pre-1991 districts (Plan 1) were reinstated by virtue of the objection, but these districts were malapportioned and, in any event, could be used only if candidate filing were reopened and early balloting were delayed. The City, however, had no authority under state law either to reopen filing or to change the election schedule. Thus, no matter what course the City chose, it was necessary for it to seek judicial intervention to obtain authority either to stop the election or to proceed.

On Monday morning, October 7, 1991, the City filed its counterclaim in *Campos v. City of Houston*, S.D. Tex. (No. H-91-885). The plaintiffs in that case, who are petitioners here, purported to represent the class of all Hispanic voters in the City of Houston[10] and had challenged the 9-5-1 structure of the city council pursuant to section 2 of the Voting Rights Act. 42 U.S.C. § 1973. The City alleged in its counterclaim that it could not proceed with the election using Plan 2, yet its previously adopted plan, Plan 1, was malapportioned under one-person/one-vote principles. The City asked the court to declare the status of Plan 1 and, if appropriate, to enter an order establishing an interim plan that would permit the City to conduct the election on schedule. Since Plan 2 was the only plan in existence at the time the suit was filed that was based on the 1990 census, was not retrogressive when compared to Plan 1 which was based on the 1980 census, and was in

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[10] Several months after issuance of the district court decision that is being challenged here, the petitioners withdrew their request for class certification.

compliance with equal population requirements of the Constitution, the City asked that it be considered for use as the interim plan for the November 1991 election even though it had been the subject of an objection.[11]

The City, however, had already initiated efforts to create another option that would address and resolve the Attorney General's objection. At the evidentiary hearing on Wednesday, October 9, the City informed the district court of these efforts and expressly asked the court to defer decision for at least one day in the hope that the City would be able to develop an agreed plan that would be acceptable to the Hispanic plaintiffs and that would resolve the Attorney General's concerns. On Thursday, October 10, 1991, the City amended its counterclaim to drop the request that Plan 2 be ordered and instead asked only that the district court adopt an unspecified "interim plan." The court was advised at its hearing the next day that this amendment was made for the specific purpose of conforming the pleadings to the City's request that a new plan, rather than Plan 2, be ordered for interim use.

The City was unable to reach an agreement with the plaintiffs.[12] Nevertheless, on Friday morning, October 11,

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[11] The Department of Justice was not named as a party to the litigation. The City, however, informed the Department over the weekend of its intent to file suit on Monday and provided the Department with a copy of the counterclaim as soon as it was filed. The Department chose to participate as an amicus rather than as an intervenor.

[12] The plaintiffs were willing to agree to a 9-5-1 interim plan only if it was coupled with an agreement to change the structure of the city council from 9-5-1 to sixteen single member districts. The City of Houston is not empowered to change its

1991, the council adopted a new plan (Plan 3) designed to respond to the Attorney General's objection. The new plan, along with an election schedule for reopening filing and postponing the start of early balloting was submitted to the Attorney General for preclearance under section 5 of the Voting Rights Act at approximately 12:30 p.m. that same day and was simultaneously submitted to the district court with a request that the court order it, rather than the objected-to Plan 2, as the interim plan. Although the City expressly urged the adoption of Plan 3, which was the plan that was designed to cure the Department of Justice objection, it emphasized that the choice of the interim plan to be used ultimately rested with the court. The Hispanic plaintiffs opposed adoption of *any* nine district plan for use in the November 5, 1991 election and, therefore, objected to the use of Plan 3.

In order to consider the City's request regarding Plan 3, the district court postponed its decision until 1:30 p.m. the next day, Saturday, October 12. Approximately two hours before the court was scheduled to rule, the Attorney General indicated that he did not object to Plan 3. Nevertheless, the district court ordered that the November 5, 1991, election proceed on the basis of Plan 2.

Pursuant to the district court's October 12, 1991, order, the election process began. As indicated in more detail in the statement of the case contained in the

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election structure without a charter amendment approved by the voters of the City. *See Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984).

petition, there were numerous, unsuccessful efforts to stay or enjoin the election.

**Post-election events**

After the November 1991 election and the appeal of the order permitting that election to proceed, there were at least two relevant occurences. First, the three-judge court considered the motion of the United States to invalidate the results of the November 1991 election and to order that new elections be held. The court expressly denied the motion and dismissed the case. *United States v. City of Houston*, ___ F. Supp. ___, Nos. 91-3076, 91-3117, 1992 WL 232359 (S.D. Tex. August 21, 1992) (3-judge court). No appeal was taken by any party. As the disposition of the three-judge court case relates to the ability of this Court to grant any relief in response to the petition, a copy of that Court's opinion and judgment is reprinted as an Appendix.

Second, the City and the petitioners have entered into a settlement agreement, and the district court has abated the case until early 1994 pursuant to that agreement. While the settlement relates primarily to the original section 2 case in which the counterclaim that forms the basis for this petition for writ of certiorari was filed, portions of that settlement may be relevant to the consideration of the petition. Among the elements of the settlement are (1) an agreement that the November 1993 election will be conducted pursuant to a plan that is substantially similar to Plan 3 and that is submitted for preclearance under section 5 of the Voting Rights Act and (2) an agreement abating proceedings in the section 2 case

until after the voters have had an opportunity to consider a charter amendment in November 1993 that, if enacted, would create 16 single-member council districts.

## REASONS TO DENY THE PETITION

### I.

**The Court is Without Jurisdiction to Entertain the Petition for Writ of Certiorari since the Petitioners Disagree Only With the Court of Appeals' Reasoning and Not With Its Decision**

Although the petitioners are asking this Court to exercise its certiorari jurisdiction to review the decision of the Fifth Circuit, their quarrel is only with the reasoning of the court and not with its decision. Accordingly, this Court is without jurisdiction to hear their petition.

The petitioners appealed the decision of the district court ordering use of Plan 2 as an interim plan for the 1991 election. The Fifth Circuit agreed that the district court erred, and it accordingly vacated the district court order and remanded the case. Petitioners' complaint is not with the court of appeals' decision, but rather is with its rationale. Essentially, petitioners would have preferred the court of appeals to have based its decision on a broader jurisdictional theory instead of an abuse of discretion analysis.

While this Court does not appear to have written on the issue in cases arising under its certiorari jurisdiction, in appellate cases it has made it clear that it has no

jurisdiction to entertain appeals from a party who is satisfied with the lower court's disposition of the case. *Gunn v. University Committee to End the War in Viet Nam*, 399 U.S. 383, 390 n.5 (1970); *Public Service Commission v. Brashear Freight Lines*, 306 U.S. 204, 206-207 (1939); *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 176 (1934); *New York Telephone Co. v. Maltbie*, 291 U.S. 645, 646 (1934). Presumably, the absence of decisions relating to this type of case arising under the Court's certiorari jurisdiction is attributable both to the fact that very few people seek judicial review when their disagreement is with the lower court's rationale rather than its decision and to the likelihood that any such cases that might arise are disposed of through a summary denial of the petition. There is, however, no reason that the same jurisdictional and policy considerations present in the cases arising under the appellate jurisdiction of this Court would not apply equally to those arising under the certiorari jurisdiction.

A narrow exception to the general rule has been recognized where a party obtains a generally favorable decision from the lower court but retains a personal stake in a collateral issue that is sufficient to satisfy the requirements of article III. *E.g., Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 334 (1980). That is not, however, the case here as the petitioners' complaint goes not to any collateral issue decided below but rather relates only to the rationale underlying the court of appeals decision. Merely complaining about the lower court's reasoning is not sufficient to establish the personal stake necessary to sustain an appeal. As Justice Scalia noted when he served as a circuit judge in a case in which the appellants complained that an FCC decision that defined the scope of the

agency's jurisdiction would have a practical and legal impact on them:

> All persons adversely affected by [a] rule would have standing to challenge its compliance with legal prescriptions designed for their protection. [citations omitted] The situation is different, however, when an interpretation of a statute, or some other legal principle, is set forth *as the rationale of an adjudication*. No one would contend that a person affected by no more than the precedential effect of a district court decision would have standing to appeal that decision here.

*Radiofone, Inc. v. Federal Communications Commission*, 759 F.2d 936, 938 (D.C. Cir. 1985) (emphasis in original). The rationale of the adjudication in the court of appeals is, of course, all that petitioners complain of here. That is not sufficient to invoke this Court's jurisdiction.

Finally, the petitioners have a difficult time maintaining that the court of appeals erred in using an abuse of discretion analysis since their brief in the Fifth Circuit invited the court of appeals to decide the case on precisely that basis. While the petitioners' primary argument was that the district court was without jurisdiction, they expressly raised the abuse of discretion claim as an alternative theory.[13] In short, the petitioners are asking this

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[13] The brief filed by the petitioners (appellants below) in the Fifth Circuit stated:

> Finally, even if jurisdiction exists, the district court abused its authority in granting the injunctive relief ordering a plan which has been voided by the Section 5 process into effect.

– page 12

Court to reverse the court of appeals for doing what the petitioners asked.

## II.

**Any Relief That Could be Granted in Response to This Petition is Barred Either by Mootness or the Final Judgment of the Three-Judge Court**

The district court order that was considered by the court of appeals and is now the subject of this petition was interim in nature and related only to the November 5, 1991, election. Specifically, it enjoined the City from using Plan 1 for the November 1991 election and then ordered that

> (2) 9-5-1 plan #2 is to be utilized as an interim plan to enable the November 5, 1991 elections to proceed. Those persons elected in the November 5, 1991 City Council election shall hold office until their successors are elected under a permanent apportionment plan (9-5-1 plan #3 or otherwise) which complies with the Voting Rights Act and the United States Constitution.

*Campos v. City of Houston*, 776 F. Supp. 304, 308 (S.D. Tex. 1991) (Petition at A-27).

The November 1991 elections have now occurred. Relief in the form of preventing that election is now obviously impossible. To the extent that the petitioners

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> Any application of the tests set down in [*Canal Authority of State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974)] makes it clear that the district court abused its discretion.
>
> – page 28

may be concerned about the November 1993 election, the district court order did not affect that future election other than requiring that any plan used in that election comply with the Voting Rights Act. Further, the petitioners and the City have already agreed in a settlement agreement in this case that the 1993 elections will be held under a plan that will be substantially similar to Plan 3 and that will be submitted for preclearance.

The only possible effect a decision in this case could now have would be to invalidate the 1991 elections and cut short the two-year terms of the councilmembers elected at that time. No party, however, is seeking that relief. In fact, both the petitioners and the City have represented to the district court that they are not seeking to hold a new election prior to the next regularly scheduled election in November 1993.[14] Further, an order to require new elections was sought by the United States in the three-judge court case, in which both the petitioners and the City were parties. That court expressly declined to require special elections and dismissed the case. The time for any appeal of that judgment to this Court has now passed. *United States v. City of Houston*, ___ F. Supp. ___, Nos. 91-3076, 91-3117, 1992 WL 232359 (S.D. Tex.

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[14] At the June 4, 1992, hearing in the district court, the following exchanges occurred:

> THE COURT: Do you want a special election?
>
> MR. REYES (counsel for plaintiffs/petitioners): No, Your Honor. . . .
>
> THE COURT: Does the city want a special election?
>
> MR. HEATH (counsel for the City): No, Your Honor.

– page 4

August 21, 1992) (3-judge court), reprinted *infra* as an Appendix. Both the City and the petitioners are bound by that judgment.

Thus, the only relief that petitioners could have received in this case is either enjoining the election from occurring in the first place or invalidating it and requiring that a new election be held. The possibility of preventing the election became moot as soon as the election was held on November 5, 1991. The possibility of invalidating the 1991 election and requiring that a new election be held is not relief that is sought by either party and, indeed, both parties are now precluded from doing so by final judgment in the three-judge court.

In short, the petition does not raise any claim for which this Court can grant relief; it asks merely for an advisory opinion on the validity of the rationale used by the Fifth Circuit to reach its decision. That is not sufficient to confer jurisdiction on the Court. *Montana v. Imlay*, ___ U.S. ___, 61 USLW 4001 (Nov. 3, 1992); *see generally Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130, 2136 (1992).

## III.

**The Issue Presented in the Petition is Unlikely to Reoccur**

It is not at all unusual for federal district courts to be requested to order use of an interim redistricting plan when an election is imminent and the existing district boundaries are legally defective. The situation presented in this case, however, is relatively unique and unlikely to reoccur for at least two reasons. First, the factual and procedural context that presents the question arises

because of the interaction between the timing of the Attorney General's section 5 objection and the petitioners' tactical decision to use that objection as leverage to obtain a favorable resolution of non-section 5 issues. It is not likely that this particular confluence of circumstances will occur again. Second, even if the situation should present itself again, the Fifth Circuit opinion makes it abundantly clear that a district court should rarely, if ever, order use of an unprecleared plan when a precleared plan is available.

**A. The case arises out of a highly unusual situation created by the interaction between the timing of the Attorney General's objection and the petitioners' opposition to any plan that the City had legal authority to adopt.**

The objection that gave rise to this dispute was made eleven days after the statutory deadline for candidates to file to run for office. Because of the timing of the objection the City was unable to address and resolve the Attorney General's concerns on its own initiative. The City was precluded by state law from altering the election schedule, which would have been necessary if it was to utilize a different plan, and it was precluded by the Voting Rights Act from proceeding with the objected-to Plan 2. Accordingly, the City's only viable option was for it to invoke the jurisdiction of the district court and to ask the court to order the use of an interim plan.

The receipt of an objection shortly before a scheduled election and the decision to ask a district court to enter an interim plan in such situations are not atypical. *E.g.*, *Upham v. Seamon*, 456 U.S. 37 (1982); *Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (3-judge ct.), *vacated and*

*remanded for reconsideration in light of amendments to Voting Rights Act*, 461 U.S. 921 (1983); *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982), *application for stay denied*, 456 U.S. 902 (1982). Normally, though, the parties have a joint interest in seeking interim relief to permit the election to go forward even though they may, and frequently do, have significant disagreements about the details of the plan that should be adopted. Here, however, the petitioners opposed the use of any interim plan based on the 9-5-1 council structure. Essentially, the petitioners made a tactical decision to use the Attorney General's section 5 objection as a means of holding the November 1991 election hostage in an effort to obtain a favorable resolution of their section 2 claim. While that may have been a reasonable decision for petitioners to make in the specific context of this litigation, it is not one that should be expected to be repeated frequently. Thus, it is unlikely that this specific procedural posture will reoccur, and the issue is accordingly not one that should be of broad application.

### B. The Fifth Circuit opinion makes it unlikely that another district court would choose an objected-to plan as an interim remedy when a precleared plan was available.

The petitioners complain that the Fifth Circuit analyzed this case under abuse of discretion standards and did not hold, as a matter of law, that no election could be held under an interim plan to which the Attorney General had objected when a precleared plan was available. While it is conceivable that a court facing a similar situation could adopt an objected-to plan in lieu of a precleared one, it is hardly likely. The opinion below

makes it clear that the precleared plan is the one to be favored and that the district court will face a very heavy burden to justify its rejection. Failure to adopt the precleared plan will likely be an abuse of discretion just as it was found to be here. Given the Fifth Circuit opinion it is highly unlikely that other district courts will make the choice that petitioners ask this Court to foreclose.

## IV.

## There is No Important Question of Federal Law as the Opinion Below is Entirely Consistent with the Settled Law

This case does not present any issue of conflict among the courts of appeal. There is no divergence of authority that must be resolved by this Court. In fact, the case is one of first – and given the unusual circumstances under which it arose, perhaps one of last – impression.

An examination of the three arguments advanced by petitioners for granting the petition shows that none demonstrates any departure from established law and none raises an important issue that requires resolution by this Court.

### A. The case does not raise questions involving the scope of section 5 coverage.

The petitioners essentially contend that the procedure followed by the City was a subterfuge to circumvent the requirements of section 5 of the Voting Rights Act and that the case could be brought only pursuant to section 5 and only in the United States District Court in the District of Columbia. *See* 42 U.S.C. § 1973c. This

contention, however, is not supported either by the factual posture of the case or by the established law.

First, the City's lawsuit did not ask that the Attorney General's section 5 decision be reviewed. The City recognized that the objection made Plan 2 invalid and that it could be used, if at all, only on a temporary basis in response to exigent circumstances. There was never any question that a new permanent plan would have to be adopted and approved under section 5.

Second, as the petitioners recognize, the legal effect of the Attorney General's objection to Plan 2 was to reinstate Plan 1, which was based on ten-year old census data and posed serious one person/one vote questions. The City's lawsuit related to the validity of Plan 1, not to the merits of the Attorney General's objection. While the petitioners would have had the City bring that suit in a section 5 action in the District of Columbia, the basic issue posed by the suit, *i.e.*, the validity of Plan 1 under one person/one vote standards, is not a section 5 question and is not required to be resolved by a three-judge court. 42 U.S.C. § 1973c; *see United States v. Board of Supervisors*, 429 U.S. 643, 646-47 & n.3 (1977).

The petitioners' rationale for urging that the suit be brought in the District of Columbia is the implicit argument that the City's counterclaim was not a one person/one vote case, but instead was an attack on the Attorney General's objection. This argument ignores the limited nature of the City's pleadings, ignores the very real difficulties faced by the City because of the timing of the objection, ignores the interim nature of the relief sought, and ignores the City's express request that the district court implement the plan (Plan 3) that addressed and

resolved the Attorney General's objection. Further, not only was no section 5 issue presented on the face of the pleadings,[15] there was no certainty that any section 5 issue would arise in the resolution of the suit. Even if one assumes that the district court would find that Plan 1 was invalid and also assumes that the court would grant interim relief, it is entirely possible that it would order that the election be held under Plan 1, notwithstanding its constitutional infirmity, or that it be held under Plan 3. Indeed, the petitioners expressly admit as much.[16] If the district court had ordered the use of either Plan 1 or Plan 3, there would have been no section 5 issue, since both plans had been precleared. This clearly illustrates the flaw in petitioners' legal analysis. Under their theory, there would have been jurisdiction for certain forms of relief, but not others. As the Fifth Circuit noted, the petitioners' argument fails because "it would make *jurisdiction* depend upon the relief ultimately ordered by the court." *Campos v. City of Houston*, 968 F.2d at 451 (Petition, A-11 thru A-12).

Third, one cannot decide the issue outside the factual and procedural context in which the case was presented.

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[15] Even if the original counterclaim could be viewed as raising a section 5 issue since it asked that Plan 2 be used as an interim plan, that possible interpretation of the pleadings evaporated when the counterclaim was amended to omit the references to Plan 2 in anticipation of the City's request that Plan 3 be adopted.

[16] "If the district court felt that it did not have time to order plan #3 into effect, it could have ordered the election to take place under the malapportioned plan #1 under its emergency power exercised in one-person, one-vote cases."

Petition at 20

The critical fact, which is omitted from the petitioners' argument and their description of the case, is that the City expressly asked the district court to order use of Plan 3.[17] The petitioners ask this Court to decide whether a governmental body should be permitted to engage in machinations to undermine the purposes of the Voting Rights Act by using the judicial process to reinstate a plan (*i.e.*, Plan 2) that has been disapproved by the Attorney General. That issue is, of course, not properly presented for decision by this case since the City asked that Plan 3, rather than Plan 2, be adopted.

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[17] The City's request is apparent from the following exchange between the district court and the City's attorney:

> THE COURT: Are you asking that [Plan 2] be adopted as the interim plan?
>
> MR. BICKERSTAFF: No, sir. Our request is that the Court adopt the plan, which the council has approved and adopted on this date [i.e., Plan 3], which addresses the objections in an effort to increase the opportunity for Hispanic representation.
>
> . . .
>
> The reason we are urging the plan which was adopted today, the third plan, is that that plan is designed to address the objections that were raised by the Department of Justice.

Statement of Facts (October 11, 1991) at 26-27. The Fifth Circuit recognized this fact in formulating its opinion as it said:

> At the hearing [on October 11] . . . the City urged the court to adopt Plan 9-5-1 #3 as an interim plan pending preclearance.

*Campos v. City of Houston*, 968 F.2d 446, 449 (5th Cir. 1992) (Petition, A-5).

**B. The district court had clear jurisdiction over the City's counterclaim.**

The petitioners claim that the City had no case or controversy to litigate with them since the petitioners did not implement Plan 1 which was the subject of the counterclaim. Clearly, however, the petitioners could have raised the issue in a suit against the City. Given that circumstance, the law is well established that the City could seek a declaratory judgment by bringing suit against persons who would typically be plaintiffs. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19 (1983); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273-274 (1941); *see Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 248 (1952).

Further, it is hardly correct to urge, as petitioners do in their petition filed with this Court, that the City had no reasonable basis to believe that it would be subject to a suit raising the one person/one vote issue. When a redistricting plan is disapproved, resulting in the reinstatement of a prior plan based on an out-of-date census, the typical strategy is to challenge the malapportionment of the reinstated plan. *See, e.g., Terrazas, supra*, 537 F. Supp at 518; *Seamon v. Upham*, 536 F. Supp. 931, 937 (E.D. Tex. 1982) (3-judge ct), *affirmed sub nom., Upham v. Seamon, supra*. Additionally, in discussing the City's alleged lack of any reason to believe that it would be subject to a one person/one vote suit, petitioners fail to mention that their counsel, on behalf of different individuals who were part of the plaintiff class alleged in *Campos*, had amended a suit only three and one-half months earlier to bring just such a one person/one vote suit challenge against Plan 1. *Mena v. Mosbacher*, Civ. No. B-91-018 (S.D. Tex.), Second

Amended Complaint at ¶¶ 102-110.[18] The Fifth Circuit was undoubtedly correct when it concluded that had the City proceeded with Plan 1, as petitioners suggest it should have, "it faced the very substantial likelihood of an injunctive challenge and postponement of the election, or later vacation of the election results." *Campos v. City of Houston*, 968 F.2d at 450 (Petition at A-8).

Also, the petitioners make a policy argument that the effect of bringing this suit rather than a section 5 suit is to permit the City to avoid litigating against the Attorney General with his attendant resources and prestige. Petition at 16. Once again, the facts of this case do not support the claim that petitioners seek to present to this Court. The City kept the Department of Justice informed of its intentions and its actions. The Attorney General chose to be an amicus and participated fully in the litigation at every level. Furthermore, the Attorney General brought a separate section 5 enforcement action against the City in a three-judge district court. The suggestion that the course followed by the City is a means of circumventing the participation of the Attorney General is simply not borne out by the facts.

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[18] The *Mena* litigation was pending in Brownsville, Texas, and raised a panoply of redistricting issues against numerous defendants including the Secretary of Commerce, the Director of the Census, Texas state officials, the class of all 254 Texas counties, the Corpus Christi Independent School District, and the cities of Corpus Christi and Houston. The plaintiffs in *Mena* purported to represent a class, although the exact nature of the class was ambiguous and apparently narrower than the class alleged by the *Campos* plaintiffs. Clearly, though, the individuals in the *Mena* suit fell within the class that the *Campos* plaintiffs purported to represent.

### C. The petitioners raise no valid claim against the court of appeals' decision that the district court abused its discretion in adopting an unprecleared plan when a precleared plan was available.

As discussed in more detail above, the court of appeals made the ruling that the petitioners requested, *i.e.*, that the district court erred in adopting the objected-to Plan 2 when a precleared plan was available. Accordingly, the claim raised in their petition to this Court does not present a case or controversy within this Court's jurisdiction.

The petitioners' concern is based on their belief that the court of appeals should have ruled that the district court had no jurisdiction to adopt Plan 2 rather than finding that it had abused its discretion in doing so. Even if this claim were properly brought, it would not present an issue that merits an exercise of this Court's discretionary jurisdiction.

First, this Court has recently suggested that there may be circumstances that would justify the use of an unprecleared plan in emergencies. *Clark v. Roemer*, ___ U.S. ___, 111 S.Ct. 2096, 2102 (1991). Second, this Court has made it clear that the existence of an emergency, such as that caused by the pendency of an upcoming election, may justify the interim use of a plan that would "not in all respects measure up to the legal requirements, even constitutional requirements." *Upham v. Seamon*, 456 U.S. 37, 44 (1982).

The justification for refusing to tie the hands of the district courts so that they could never use an unprecleared plan when a precleared plan is available is

apparent from the following hypothetical situation. A governmental body draws a redistricting plan after publication of the 1990 census that contains two predominantly minority districts. This is a significant improvement over the preexisting plan that had been drawn using the 1980 census since that plan contained only one predominantly minority district. Nevertheless, the Attorney General objects since he believes that the entity harbored a discriminatory purpose in failing to produce and adopt a plan that would have resulted in a significant minority presence in a third district. When the issue of interim relief to permit the pending election to proceed is presented to the district court, there is no time to create a new proposal and the only plans in existence are the objected-to 1990 plan which contains two minority districts and the pre-existing 1980 plan which contains only one. The 1980 plan was, of course, precleared ten years earlier. If the petitioners' position were correct, the only plan that the district court could adopt would be the previously precleared 1980 plan even though, upon any comparison with the 1990 plan, it was clearly and significantly dilutive of minority voting rights. This Court has wisely avoided placing district courts in a strait jacket that would prevent them from responding to this type of inequity.

This Court's past reluctance to limit the discretion of the district courts has been entirely appropriate; now is not the time and, given the serious article III issues posed by the posture in which the petitioners bring the matter to this Court, this is not the case to rethink that issue.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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**APPENDIX**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>CITY OF HOUSTON, ET AL.,<br>Defendants. | § | No. 91-3076<br><br><br>(Consolidated) |
| JESSE CAMPOS, W.R. (RESENDEZ) MORRIS, AND MEXICAN AMERICAN BAR ASSOCIATION OF HOUSTON,<br>v.<br>CITY OF HOUSTON, ET AL.,<br>Defendants. | § | No. 91-3117 |

MEMORANDUM OPINION ON MOTION OF UNITED STATES FOR ENTRY OF ORDER REQUIRING SPECIAL ELECTIONS

(Filed AUG 21 1992)

Before JONES, Circuit Judge, DeANDA, Chief District Judge and LAKE, District Judge.

EDITH H. JONES, Circuit Judge:

Having considered the parties' arguments and the uncontested facts adduced, this three-judge court determines that it is neither appropriate to void the results of Houston's 1991 City Council elections for nine single-

member districts[1] and order a special interim election to be conducted, nor is it proper to bow to the City's request that we retain jurisdiction to order relief in its favor. Recent developments, particularly the proposed settlement of the related case filed under § 2 of the Voting Rights Act against the City, militate against requiring an interim election. Additional background to this case is recited in our previous opinion and in other reported decisions.[2]

## I. SCOPE OF THIS COURT'S AUTHORITY

The Supreme Court has described the limits of this court's jurisdiction. We are to determine whether a particular voting or election practice is required to be precleared by the Justice Department under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, whether the local authority obtained preclearance from the U.S. District Court for the District of Columbia or the Attorney General before the election was held, and if not, what remedy may be ordered. *See, e.g., City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983). That Houston's 1991 city

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[1] The United States, acting through the Justice Department, does not assert that the elections for mayor or the five at-large city council positions should be overturned.

[2] *Campos v. City of Houston*, 776 F. Supp. 304 (S.D. Tex. 1991), stay denied, *Campos v. City of Houston*, 112 S. Ct. 354 (U.S. 1991) and vacated, *Campos v. City of Houston*, 960 F.2d 26 (5th Cir. Tex. 1992), reh'g, en banc, denied, *Campos v. City of Houston*, 1992 U.S. App. LEXIS 13949, op. withdrawn, substituted op., *Campos v. City of Houston*, 1992 U.S. App. LEXIS 17452 (5th Cir. 1992); *United States v. City of Houston et al.*, No. 91-3076, 91-3117 (S.D. Tex 1991).

council election took place under a districting plan that was required to be but was denied preclearance by the Justice Department is not here disputed.

When the Supreme Court has considered remedies for violations of section 5 after elections had taken place under non-precleared practices, it has always left the final remedial decision in the hands of the trial court. *Allen v. State Bd. of Elections*, 393 U.S. 544, 563, 89 S. Ct. 817, 830 (1969); *Perkins v. Matthews*, 400 U.S. 379, 91 S. Ct. 431, 440-41 (1971); *Berry v. Doles*, 438 U.S. 190, 98 S. Ct. 2692, 2694 (1978); *Hathorn v. Lovorn*, 457 U.S. 255, 102 S. Ct. 2421, 2430-31 (1982); *N.A.A.C.P. v. Hampton County Election Comm.*, 470 U.S. 166, 105 S. Ct. 1128, 1137-38 (1985). This was also true in *N.A.A.C.P.*, the one case in which the Court suggested that if after-the-fact preclearance of a voting change was not obtained, the ordering of a new election might be an appropriate remedy. 105 S. Ct. at 1138 n.36. In no case has a *presumptive* remedy of voiding the election been endorsed by more than two members of the Court. *See Berry, supra*, 98 S. Ct. at 2694-95, (Brennan, Marshall, JJ). The United States relies upon *Clark v. Roemer*, ___ U.S. ___, 111 S. Ct. 2096 (1991), but as that opinion states, it does not discuss "the *ex post* question whether to set aside illegal elections."[3]

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[3] The Supreme Court held in *Clark* that a three-judge court abused its discretion by failing to enjoin *ex ante* the conduct of elections for non-precleared judicial posts. However, Louisiana state authorities had been on notice of a challenge to non-precleared judicial districts for three years before the elections occurred. There is no equitable comparison between that case and this one, in which the City's attempted redistricting followed closely on the heels of the 1990 Census Report.

We therefore disagree with the contention of the Justice Department that ordering new elections is the "presumptively appropriate remedy" for the lack of preclearance of apportionment Plan #2 under which Houston's election took place.

Courts in our circuit have held that ordering new elections in the wake of a section 5 violation is a "drastic remedy" that should only be imposed when absolutely necessary to vindicate, establish or protect important voting rights. *United States v. Louisville Municipal Separate School District*, 557 F. Supp. 1168, 1172 (3-judge court, N.D. Miss. 1983) (on remand from the Supreme Court's decision in *Hathorn v. Lovorn, supra*). In *Cook v. Luckett*, the Fifth Circuit declined to void the results of a local election even though it reversed the district court's decision that had implemented an un-precleared districting plan proposed by private plaintiffs rather than a precleared legislative plan. 735 F.2d 912, 921 *et. seq.* (5th Cir. 1984). The court reiterated an earlier holding that elections will not be set aside absent " 'serious voting violations or aggravating factors, such as racial discrimination or fraudulent conduct . . . ' " 735 F.2d at 922 (quoting *Saxon v. Fielding*), 614 F.2d 78, 79 (5th Cir. 1980).

Two lower-court cases cited by the government to support its motion for a new election are distinguishable. In one of them, the court ordered a new election as a remedy for the impermissible conversion to staggered-term elections of county supervisors. *United States v. Onslow County*, 683 F. Supp. 1021 (E.D. N.C. 1988). Some such order was obviously the only means to change from staggered terms to concurrent terms. In the other case, officeholders were elected under an invalid system to

four-year terms. The court ordered new elections after two years. *United States v. Cohan*, 358 F. Supp. 1217 (S.D. Ga. 1973).[4]

Ordering new elections is a drastic remedy for reasons that should be obvious. When elections have been held – even under a voting scheme that does not technically comply with section 5 – the people have chosen their representatives. Neither the Justice Department nor this court should lightly overturn the peoples' choices. Second, as the cost of ordering new elections may be high relative to other public priorities, a jurisdiction forced into holding a special election has much less to spend on those other necessities. This cost should not be cavalierly brushed away by other branches of government, whether federal or judicial, that neither pay it nor impose the tax burden on which a remedy depends.

Further, the rationale for requiring new elections seems particularly weak where, as here, officeholders serve for only two years. Given the usual delays of litigation, ordering a special election would ordinarily result in

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[4] It is incorrect to suggest, as does the Justice Department, that a "very similar action" was presented in *Coalition to Preserve Houston v. Interim Bd. of Trustees*, 494 F. Supp. 738, 742 (S.D. Tex. 1980), aff'd and appeal dism'd, 450 U.S. 901 (1981).

In the *Coalition to Preserve Houston* case, the defendants, the trustees of the Westheimer Independent School District, had created a new political entity in direct violation of a Justice Department order. *Id.* at 740, with the demonstrated discriminatory intent of frustrating a busing decree. *See, Ross v. Houston Indep. Sch. Dist.*, 457 F. Supp. 18, 26 (S.D. Tex. 1977), aff'd in part, vacated in part, 583 F.2d 712 (5th Cir. 1978). None of these facts are present in this case.

the installation of the court-approved electoral scheme for only a few months before the regular election cycle begins. What benefit accrues to the public from this interference is dubious. A special election also tends to skew the process of candidate selection. Potential candidates must decide to run, and to change their personal and professional schedules dramatically, on much shorter notice than they would face in preparing for a regular election cycle, and they must make this decision in the face of two extraordinary obstacles. First, tremendous uncertainty inheres in the typical low turnouts at special elections. Second, a significant financial hurdle is imposed by the prospect of a candidate's financing not one but two electoral races in close proximity – those for the special election and the ensuing regular election.

In endorsing the rule that ordering new elections is a drastic remedy to be reserved for the most egregious cases, we do not foresee that such a rule will undermine compliance with section 5 preclearance procedures. Most public officeholders take just as seriously as does the Justice Department their responsibility to follow the Voting Rights Act. It is significant that notwithstanding consistent Supreme Court authority that places discretion in the trial court to fashion a remedy for section 5 violations, and notwithstanding the thousands of voting changes that are the subject of preclearance requests each year, only a handful of reported cases deal with a dispute over the appropriate remedy for section 5 violations after an election has taken place.

## II. WHAT REMEDY IS APPROPRIATE IN THIS CASE

Like the courts in *Louisville* and *Cook*, we do not find here the "drastic circumstances" that require ordering a new election in Houston before the regular city elections in 1993. We discern no section 5 impediment to the settlement negotiated in the companion section 2 case. That settlement, reached in June between Hispanic plaintiffs and the City, provides that the voters of Houston will decide – again – whether to enact a 16-6-1 council configuration, or will vote in the 1993 city council elections in districts substantially similar to those contained in the previously precleared Plan #3 boundaries.[5] Because the settlement enforces an apportionment plan based on one that has mustered section 5 preclearance, we do not need to impose any additional remedy at this time.

These conclusions are based on an evaluation of the following equitable factors.

First, the 1991 city elections were, to put it mildly, not conducted without judicial scrutiny of the issue that confronts us here. The district court's choice of injunctive relief, although later overturned on appeal, was reviewed on an expedited basis by the Fifth Circuit, the Supreme Court and this court. As was stated in *Louisville*, "local . . . officials as well as the . . . electorate should have the right to rely upon prior judicial determinations

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[5] Plan #3 provides for five at-large districts, a mayor, and nine single member districts, in two of which Hispanic voting age population constitutes 58.14% and 50.50% of the population respectively. The city acknowledges that minor changes to the previous configuration of Plan #3 will require submission to the Justice Department for preclearance.

. . . unless there are compelling reasons to the contrary." 557 F. Supp. at 1172.

Second, there is no evidence that the city elections were infected by invidious discrimination or serious irregularities[6] or that minority votes were substantially diluted. In fact, a contrary evaluation seems more accurate: Black and Hispanic candidates were elected to at-large council posts, defeating opponents of other races in the process, and minority candidates succeeded in being elected to the "minority districts" extant under Plan #2. Houston's city council now includes two Hispanics, four Blacks, and eight Whites. The Justice Department's complaints ring hollow against these indicia of the vitality of minority electoral opportunities. The federal government's interest would have been far better served by a gracious acknowledgment of these results rather than by its rigid insistence upon obtaining immediate compliance with section 5.[7]

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[6] We decline the parties' requests to cast aspersions on either side for pre-election delays in the administrative preclearance process. There is no record of bad faith by the City, and the Justice Department's tardiness indicates no more than bureaucratic inertia. Redistricting to accommodate the then controversial 1990 census results was difficult for all parties to the process. Assessing blame might have been relevant as part of the balancing of equities *prior to* the election (cf. order of Scalia, J., ___ U.S.L.W. ___, but it serves no point at this late date.

[7] The Justice Department's staunch adherence to Plan #3, in the face of electoral reality as well as the goals of section 5, seems strange. The Justice Department refused to preclear Houston's Plan #2 because it contains only one "safe" Hispanic district. Plan #3 was fashioned with a bare majority of voting-age Hispanics in two districts.

Third, salient facts were ignored by the Justice Department's submissions that, from the Hispanic voters' perspective, argue against holding a special election. City council term limits were approved by the voters in November 1991; in any succeeding city election there will be a significant turnover of the council's membership, wiping out the advantages of incumbency that might otherwise dilute minority opportunities. Because Plan #3 as precleared by the Justice Department provides for one of the two potential "Hispanic" council districts in which Hispanics comprise only 27% of the registered voter population and 50.50% voting age population, a voter registration drive would be necessary to assure optimal Hispanic participation. Such a drive would be hard to mount concurrently with the expedited election schedule sought by the Justice Department. The federal government's eagerness to press a premature election date, far from vindicating Hispanic voters' role in the electoral process, could undermine their role simply to preserve the Justice Department's section 5 preclearance rights.

Fourth, the Justice Department's request is essentially a collateral attack upon the settlement that the City

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The Justice Department's assertion here seems to be that while plan #2 created one safe Hispanic district, it was less desirable than plan #3 which created two marginal Hispanic districts. This position assumes that the legal standard in section 5 cases is to maximize minority representation. This is an incorrect statement of law. The correct standard for section 5 preclearance cases is, in the words of the Supreme Court in *Beer v. United States*, 425 U.S. 130, 141 (1976) and *City of Lockhart v. United States*, 460 U.S. 125, 133, 134 n.10 (1983), to prevent "retrogression".

has reached with Hispanic plaintiffs in the pending section 2 voting rights action. To the extent the Justice Department contends that the section 2 court "lacked jurisdiction" to order the city elections to go forward in November 1991, its argument has been refuted by the revised Fifth Circuit opinion in the case. *See Campos v. City of Houston*, opinion on rehearing, ___ F.2d ___, 1992 WL 180267 (5th Cir. 1992). Because the district court had jurisdiction to order some relief before the 1991 elections, and because it maintains jurisdiction to approve a settlement that complies with the Voting Rights Act, it would be most unseemly for this coordinate court, by ordering a new election, to grant the kind of relief that the Fifth Circuit refused. This is not to say that we, as a three-judge court, lack jurisdiction to grant the relief sought by the United States. Rather, we conclude that it would be an unwise exercise of our discretion to interfere with the settlement of a bona fide, hotly contested section 2 case, which has been predicated upon the implementation of nearly the same redistricting plan that the Justice Department precleared.

## III. CONCLUSION

Although Houston's 1991 city council election technically was held under an un-precleared apportionment plan, the "drastic circumstances" do not exist that mandate this court's entering an order voiding the results of that election and requiring a special election to be held. An appropriate remedy is the one embodied in the settlement proposed between the Hispanic plaintiffs and the City in the pending section 2 litigation, for it contemplates that City elections held in due course in 1993 will

be conducted under an apportionment plan tailored upon the one that the Justice Department has already precleared. This prospective relief is, under the circumstances of this case, sufficient to satisfy the demands of section 5. *Louisville, supra*. As that settlement will be implemented by the section 2 court, this court need not issue a redundant order.

These cases are *DISMISSED*.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
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| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>CITY OF HOUSTON, ET AL.,<br>Defendants. | § | No. 91-3076<br><br>(Consolidated) |
| JESSE CAMPOS, W.R. (RESENDEZ) MORRIS, AND MEXICAN AMERICAN BAR ASSOCIATION OF HOUSTON,<br>v.<br>CITY OF HOUSTON, ET AL.,<br>Defendants. | § | No. 91-3117 |

FINAL JUDGMENT

(Entered Aug. 21, 1992)

The Motion of the United States for Entry of Order Requiring Special Elections having been heard and determined as discussed in the attached Memorandum

Opinion, dated August 21, 1992, it is hereby ORDERED that the Motion is DENIED; and these cases are DISMISSED.

/s/ Edith H. Jones
Honorable
Edith H. Jones
U.S. Court of Appeals
for the Fifth Circuit

/s/ James DeAnda
Honorable
James DeAnda
Chief Judge
Southern District of
Texas

/s/ Sim T. Lake
Honorable Sim T. Lake
U.S. District Judge
Southern District of
Texas

Date: August 20, 1992